06-5247

Supreme Court, U.S.
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In the Supreme Court of the United States

No. _____

JOHN F. FRY, PETITIONER

v.

CHERYL K. PLILER, Warden, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ORIGINAL

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QUESTIONS PRESENTED

1. Can a trial court's unconstitutional exclusion of *reliable* evidence of third party guilt be deemed harmless error?

2. This Court's decisions in *Holmes v. South Carolina* ___U.S.___, 164 L.Ed.2d 503, 126 S.Ct. 1727 (2006), and *House v. Bell*, ___U.S.___, 2006 U.S. Lexis 4675 (2006), were handed down after the decision of the Ninth Circuit below. Should this Court issue a GVR order in this case, directing the Ninth Circuit to reconsider its decision that the unconstitutional exclusion of *reliable* evidence of third party guilt can be harmless, in light of *Holmes* and *House*?

3. If constitutional error in a state trial is not recognized by the judiciary until the case ends up in federal court under 28 U.S.C. § 2254, is the prejudicial impact of the error assessed under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), or that enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)? Does it matter which harmless error standard is employed? And, if the *Brecht* standard applies, does the petitioner or the State bear the burden of persuasion on the question of prejudice?

LIST OF PARTIES

Petitioner, John Francis Fry, is represented by Victor S. Haltom, Esq., of Sacramento, California.

Respondent, Cheryl Pliler, a warden in the California Department of Corrections, is represented by Deputy Attorney General Ross C. Moody, of San Francisco, California.

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PETITION FOR A WRIT OF CERTIORARI

John F. Fry, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, see App., *infra*, 1a - 5a, is unreported, but is available on line at *Fry v. Pliler*, 2006 U.S. App. Lexis 2694 (CA9 2006). The order of the court of appeals denying Mr. Fry's petition for rehearing and suggestion for rehearing en banc, see App., *infra*, 6a, is unreported.

The memorandum of findings and recommendations prepared by the magistrate judge, see App., *infra*, 8a-72a, which was adopted in full by the district court, see App., *infra*, 73a-74a, is unreported.

JURISDICTION

The opinion of the court of appeals was issued on February 2, 2006. App. 1a. The order of the court of appeals denying Mr. Fry's petition for rehearing was entered on April 25, 2006. App. 6a. The judgment of the court of appeals was filed on May 5, 2006. App. 7a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI of the Constitution provides, in pertinent part, that the "Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...."

The Compulsory Process Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor...."

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law...."

STATEMENT

This case raises questions concerning the reach of the harmless error rule, and whether the rule may be applied so as to allow a defendant's criminal

conviction to remain in tact following a trial in which *reliable* evidence of a third person's confession to the charged crime was unconstitutionally excluded.

Every federal judge who has considered Mr. Fry's case has concluded that the state judge who presided over Mr. Fry's third jury trial committed constitutional error by excluding *reliable* evidence of another man's confession to the double homicide for which Mr. Fry is now serving a sentence of life imprisonment without the possibility of parole. App. 2a, 4a, 53a-54a, 73a-74a.

No court has ever held, in a published case, that a trial court's unconstitutional exclusion of *reliable* evidence of a third person's confession to the crime a defendant has been convicted of committing is harmless error. Yet, such a conclusion was reached in the unpublished 2-1 panel decision by the Ninth Circuit below. App. 1a-5a. The ultimate question in this case is whether this result constitutes a constitutionally permissible application of the harmless error doctrine.[1]

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[1] Although the harmless error doctrine is not expressly set forth in the Constitution, the question of whether a constitutional violation may be deemed harmless is a federal constitutional question: "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967).

A. Basis for Jurisdiction in the Lower Courts

This is a habeas case brought in federal court by a state prisoner. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The court of appeals had jurisdiction of the appeal pursuant to 28 U.S.C. § 2253(a).

B. Procedural Background

Mr. Fry was tried by jury three times in the Superior Court of California, in Solano County, on two counts of murder. See California Penal Code § 187. The first two jury trials ended in mistrials due to juror deadlock. App. 1a, 4a, 12a-13a, 45a, 54a, 108a.[2] Mr. Fry was convicted of both counts of murder in the third trial, after the third jury had deliberated for five weeks and had once declared itself to be deadlocked. App. 1a, 4a, 8a, 13a-14a, 45a, 54a, 61a-66a.[3] Mr. Fry was sentenced to imprisonment for life without the possibility of parole. App. 9a, 75a.

C. The Underlying Facts

Shortly after 6:00 a.m., on October 27, 1992, the bodies of James and Cynthia Bell were found in a vehicle parked on a dirt shoulder next to a highway in northern California. They had both been shot to death. App. 14a.

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[2] The jury in the first trial was divided 6-6. The jury in the second trial was split 7-5. App. 13a-14a.

[3] The jury in the third trial had declared itself to be split 7-5. App. 14a.

There was evidence which linked Mr. Fry to the double homicide: Mr. Fry frequently sold methamphetamine to Cynthia Bell, and at the time of her death, she was in debt to him. App. 25a, 46a. There was witness testimony that Mr. Fry was upset about this debt and that he had threatened to kill Ms. Bell. App. 18a, 20a, 25a, 29a. Witnesses described seeing a vehicle similar to Mr. Fry's near the crime scene shortly before the Bells' bodies were discovered. App. 77a, 94a. Certain witnesses, including Mr. Fry's brother, testified that Mr. Fry admitted killing the Bells. App. 24a, 27a.[4] A criminalist called by the prosecution testified that a gun owned by Mr. Fry was the murder weapon. App. 90a.

However, there was also evidence that someone else committed the double homicide: A disinterested eye-witness from Missouri, who was driving a commercial truck, testified that he saw the shootings occur, and that Mr. Fry was not the shooter. App. 29a, 45a.[5] An employee of the business at which the truck driver subsequently made a delivery testified that the truck driver looked like he

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[4] However, Mr. Fry's brother admitted that he had been threatened by police in connection with this case. App. 44a. Further, Mr. Fry and his brother are not fond of one another. App. 44a.

[5] At the time of the double homicide, Mr. Fry was 6'2", weighed 300 pounds, and was bald. See pages 427, 436-438, 519-520 of the Excerpt of Records in proceedings below in Ninth Cir. Case no. 04-16876. According to the truck driver, the shooter had a full head of hair and was "half the size" of Mr. Fry — approximately 5'6" to 5'8" and 140 pounds. App. 99a-100a.

had seen "a ghost" and that he was "very distraught." App. 108a. A number of witnesses testified that another man, Anthony Hurtz,[6] had confessed to killing the Bells. App. 45a, 53a, 103a-106a.[7] Additionally, shortly before the Bells were killed, a witness overheard the Bells talking on a pay phone, trying to get in touch with "Leroy." App. 16a-17a, 78a Mr. Hurtz goes by the nickname "Leroy." App. 103a-104a. Also, a friend of Mr. Hurtz's was in possession of Mr. Fry's gun after the homicides. App. 57a. A defense ballistics expert, who the prosecutor conceded to be credible,[8] testified that Mr. Fry's gun could not be identified as the murder weapon. App. 94a. Finally, as to the prosecution witnesses who testified that Mr. Fry had confessed, the defense introduced evidence that they had been threatened and coerced by law enforcement, or were otherwise unreliable. App. 24a-34a.[9]

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[6] Mr. Hurtz is a drug dealer. App. 45a.

[7] However, the prosecution was able to introduce evidence concerning the bias of each of these witnesses. For example, two were estranged girlfriends of Mr. Hurtz. App. 104a-106a.

[8] See page 5109 of the Reporter's Transcript of trial proceedings, which has been lodged with the district court in Eastern District of Calif. docket no. CV-01-01580-FCD-GGH-P.

[9] For example, one of the witnesses was a notorious "jailhouse snitch," App. 48a, 88a-90a, 98a, and law enforcement had threatened to cause another of the witnesses to lose custody of her small children if she did not testify against Mr. Fry. App. 30a.

The trial court refused to allow Mr. Fry to present to the jury the testimony of the only known unbiased witness who heard Mr. Hurtz confessing to the murder of the Bells. App. 45a-54a, 150a-159a. This witness was Mr. Hurtz's cousin, Pamela Maples. App. 4a-5a, 48a-49a, 52a, 151a. Ms. Maples had "overhear[d] large portions of a conversation ... in which [Mr.] Hurtz indicated that he had committed a double homicide." App. 2a. "[T]he portions of the conversation [Ms.] Maples did hear involved idiosyncratic facts exactly matching the facts surrounding the murder of Cynthia and James Bell...." App. 2a, 52a-53a. Nevertheless, the trial court concluded that there was an insufficient foundation upon which to base a finding that the double murder Ms. Maples heard Mr. Hurtz describing was the double murder with which Mr. Fry was charged. App. 49a, 159a. Hence, the jury never received the evidence.

D. Direct Review in State Court

Following his conviction, Mr. Fry appealed to the California Court of Appeal, First Appellate District. In the course of that appeal, Mr. Fry presented a number of assignments of error, including a claim that the trial court had violated his constitutional rights by excluding Ms. Maples' proffered testimony regarding her cousin's confession to the double homicide. App. 129a-131a. The state appellate court not only failed to recognize that the trial court's exclusion of this

evidence of third party guilt was constitutional error, but also failed to recognize that the ruling was erroneous under any standard. App. 45a-54a, 129a-131a. The court also stated in a footnote that "no possible prejudice" could have resulted from the exclusion of Ms. Maples' testimony, because evidence concerning other confessions made by Mr. Hurtz was presented to the jury;[10] the court did not cite to any authority in this regard, and did not otherwise indicate the standard under which it was assessing possible prejudice. App. 50a-51a, 131a.[11] The state appellate court affirmed Mr. Fry's conviction. App. 143a.

Mr. Fry petitioned to the California Supreme Court for discretionary review. However, the court denied the petition. App. 13a.

E. § 2254 Proceedings in the District Court

Mr. Fry filed a habeas petition in the United States District Court, Eastern District of California, pursuant to 28 U.S.C. § 2254. The case was referred to a

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[10] However, the state appellate court felt that the witnesses who testified to these other confessions by Mr. Hurtz "lacked credibility, either because they had personal motives rendering them hostile to ... [Mr. Hurtz] or biased in favor of [Mr. Fry]." App. 113a.

[11] The court quite clearly did not consider prejudice under the *Chapman* standard. Indeed, the court did not even address the constitutional component of Mr. Fry's claim, analyzing the issue solely under state law principles. App. 49a-50a. As this Court recognized in *Chapman v. California*, 386 U.S. 18, the California judiciary applies a "reasonably probable" harmless error standard in cases involving non-constitutional error — a standard which is inadequate to safeguard infringements of a defendant's constitutional rights. *Id.* at 24.

magistrate judge. See 28 U.S.C. § 636; Rule 10 of the Rules Governing Section 2254 Cases in the United States District Courts. The magistrate judge issued a 65-page memorandum of findings and recommendations. App. 8a-72a. At the outset of his memorandum of findings and recommendations, the magistrate judge stated that Mr. Fry had come "close to demonstrating actionable error in some of his various claims...." App. 8a. The magistrate judge also characterized this case as "a difficult case." App. 71a. As to the state trial court's exclusion of Ms. Maples' testimony, and as to the state appellate court's affirmance of the ruling, the magistrate judge concluded that these decisions were violative of Mr. Fry's Sixth and Fourteenth Amendment rights, and constituted unreasonable applications of this Court's precedent. App. 52a-53a (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967)). The magistrate judge noted that Ms. Maples' proffered testimony was "reliable," and that the State had conceded that Ms. Maples "was the only third party culpability witness who had no apparent bias." App. 52a-53a.

In the final analysis, however, the magistrate judge concluded that the constitutional transgression did not warrant the granting of federal habeas relief.

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In this regard, the magistrate judge stated:

> "While this court cannot conclude, as did the state appellate court[,] that 'no possible prejudice' could have ensued as a result of the exclusion of the testimony, the court does find that there has been an insufficient showing that the improper exclusion of the testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict."

App. 54a-55a.

The district court adopted in full the findings and recommendations of the magistrate judge. App. 73a-74a.

F. Proceedings in the Court of Appeals

On appeal, Mr. Fry's conviction was left in tact by a divided panel of the Ninth Circuit. App. 1a-5a. The panel majority recognized that the state judge who presided over Mr. Fry's third jury trial erroneously excluded "reliable" evidence that somebody else confessed to the murder Mr. Fry has been convicted of committing. App. 2a. Although the panel majority concluded that the trial court's exclusion of the reliable third party culpability evidence constituted an objectively unreasonable application of clearly established federal law, and that the evidence "would have substantially bolstered [Mr.] Fry's claim[] of innocence[,]" the panel majority concluded that the error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). App. 2a-3a (internal quotation marks and brackets omitted).

However, aside from quoting the "substantial and injurious effect" test of *Brecht*, the panel majority did not state why or how it deemed the exclusion of the "reliable" evidence of a third party's confession to be harmless. App. 2a-3a.

Adhering to circuit precedent, the panel majority rejected Mr. Fry's argument that the prejudice inquiry in this case should have been conducted under *Chapman* rather than *Brecht*, in light of the state appellate judiciary's failure to conduct any prejudice review under *Chapman*. App. 3a (citing *Bains v. Cambra*, 204 F.3d 964, 976 (CA9 2000)).

According to the dissenting member of the panel, the "record as a whole militates in favor of a conclusion that exclusion" of the third party confession "substantially and injuriously affected the jury's verdict in this case." App. 4a. In her dissenting opinion, Judge Rawlinson offered the reasons for her conclusion in this regard: "[T]his was John Fry's third trial, with the two prior juries having failed to reach a verdict. In this third trial, even in the absence of [the excluded] exculpating testimony, the jury deliberated for five weeks before convicting [Mr.] Fry." App. 4a. Pamela Maples, who would have testified that she heard her cousin confessing to the crime, "was the only unbiased witness presented by either side." App. 4a. "Such testimony is generally recognized as having a powerful impact on jurors." App. 4a-5a (citing *Skipper v. South Carolina*, 476 U.S. 1, 8

(1986)). Thus, Judge Rawlinson was "convinced that the exclusion of Ms. Maples' testimony was not harmless...." App. 5a.

The opinion of the panel majority contained no response to Judge Rawlinson's reasoning in this regard.

Mr. Fry filed a petition for rehearing en banc. The petition was denied in a 2-1 decision. App. 6a.

REASONS FOR GRANTING THE PETITION

The unpublished 2-1 panel decision of the Ninth Circuit in this case allows Mr. Fry's conviction and life sentence to remain in tact notwithstanding the fact that the conviction occurred in a trial in which *reliable* evidence of a third person's confession to the charged crime was unconstitutionally excluded. App. 1a-5a. This unprecedented and unjust result cannot stand.

Treating the unconstitutional exclusion of *reliable* evidence of third-party guilt as harmless is illogical and does not comport with this Court's precedent.

Evidence of third-party guilt is necessarily exculpatory. If admitted and credited, such evidence will ineluctably lead to the acquittal of the defendant. However, if such evidence is improperly excluded, a reviewing court, rather than the finder of fact, must assess the impact of the erroneous exclusion of the

evidence.[12] If the reviewing court deems the evidence *reliable*, the reviewing court cannot rationally or lawfully treat the impact of the error as harmless.

It seems nigh oxymoronic to characterize the erroneous exclusion of "*reliable*" evidence of a third person's confession as harmless. Indeed, such evidence is perforce exculpatory. And, if it is reliable, i.e. something "in which reliance or confidence may be put; trustworthy, safe, sure[,]" see XIII Oxford English Dictionary at 562 (2d ed. 1989), its exclusion cannot rationally be treated as anything other than an outcome-influencing event.

This Court's cases demonstrate that the exclusion of competent, exculpatory defense evidence is unconstitutional. *Holmes v. South Carolina* ___U.S.___, 164 L.Ed.2d 503, 126 S.Ct. 1727 (2006); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. 14.[13]

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[12] Constitutional error if this ilk violates the Compulsory Process Clause of the Sixth Amendment. *Washington v. Texas*, 388 U.S. 14. And, there is precedent to support the proposition that "[a] violation of the Compulsory Process Clause is subject to harmless error analysis." 34 Geo. L.J. Ann. Rev. Crim. Proc. 623 & n. 1991 (2005) (citing *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986); and collecting other cases). This type of constitutional error also violates the Due Process Clause of the Fourteenth Amendment. *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. at 23-25 (Harlan, J., concurring).

[13] In *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court explained: "The right of the defendant to present evidence 'stands on no lesser footing that the other Sixth Amendment rights we have previously held applicable to the States.'" *Id.*, at 409 (quoting *Washington v. Texas*, 388 U.S. at 18). In this connection, the First Circuit has observed: "If the ... cases of *Washington v. Texas*, [388 U.S. 14], and *Chambers v. Mississippi*, [410

Moreover, implicit in these holdings is the principle that the exclusion of such evidence cannot be treated as harmless error. See *infra*, at 16-17.

In *Holmes v. South Carolina*, 164 L.Ed.2d 503, 126 S.Ct. 1727 this Court held that a state rule which precludes an accused criminal defendant from adducing evidence of third-party guilt, simply because the prosecution's evidence of guilt is strong, when viewed in isolation, deprives the defendant of """"a meaningful opportunity to present a complete defense."""" *Id.*, 164 L.Ed.2d at 509, 126 S.Ct. at 1731 (quoting *Crane v. Kentucky*, 476 U.S. at 689-690) (quoting in turn *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

The instant case presents a variant of issue considered in *Holmes*: Where it has been determined in federal habeas proceedings that a state trial court unconstitutionally excluded *reliable* evidence of third-party guilt, can the error be treated as harmless?

Additionally, this case presents a subsidiary issue concerning the proper standard under which prejudice is to be gauged in cases such as the instant case, *viz.*, § 2254 cases in which the state appellate judiciary unreasonably failed to

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U.S. 284], mean anything, it is that a judge cannot keep important yet potentially *unreliable* evidence from the jury." *Pettijohn v. Hall*, 599 F.2d 476, 481 (CA1), cert. denied, 444 U.S. 946 (1979) (emphasis supplied). *A fortiori*, a judge cannot keep important, *reliable* evidence from the jury.

recognize that federal constitutional error occurred at trial, and in which the prejudicial impact of the error accordingly has not been assessed under the exacting standard applicable to constitutional errors. The question is whether, in such cases, the *Chapman* standard or the *Brecht* standard should apply. On this point, the lower federal courts are split.[14] Also, on this point, the Ninth Circuit has not spoken with a single voice.[15]

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[14] The Second Circuit has observed that this Court has not "definitively established the proper harmless error standard to apply when a constitutional error is being evaluated for the first time on collateral review." *Santa-Madera v. United States*, 260 F.3d 133, 140 (CA2 2001), *cert. denied*, 534 U.S. 1083 (2002). And, the Second Circuit observed that "other courts addressing the issue are not in complete agreement." *Id.* Compare *Barrett v. Acevedo*, 169 F.3d 1155, 1164 (CA8 1999) ("we use the strict standard set out in *Chapman* ... where the state court has not applied the *Chapman* analysis in the first instance"); *Barber v. Johnson*, 145 F.3d 234, 237-238 (CA5) (conc. opn. of Dennis, J.) ("Federal courts cannot justify abstaining from the enforcement of an individual's constitutional rights in deference to the systemic values of finality, federalism, and comity ... unless there has been a good-faith State effort to protect constitutional rights by applying the *Chapman* standard."), cert. denied, 525 U.S. 1005 (1998), with *Hassine v. Zimmerman*, 160 F.3d 941, 950 (CA3 1998) (noting that "the Fourth, Fifth, Seventh, Tenth, and Eleventh circuits have all held that *Brecht*, rather than *Chapman*, enunciates the appropriate standard for determining whether a constitutional error was harmless in a federal habeas challenge to a state conviction or sentence regardless of the standard employed by the state courts") (internal quotation marks omitted), cert. denied, 526 U.S. 1065 (1999).

[15] Compare *Allen v. Woodford*, 366 F.3d 823, 857 n. 6 (CA9 2004) (noting that it is "unclear whether the *Brecht* ... standard or the [*Chapman*] standard applies[,] ... [that] [t]he Circuits are split on this issue, and [that] neither [the Ninth Circuit] nor the Supreme Court has directly addressed it") with *Bains v. Cambra*, 204 F.3d 964, 976 (choosing to apply *Brecht* rather than *Chapman*).

Furthermore, looking to the petitioner to establish the prejudicial impact of constitutional error, as the lower federal judiciary has done in this case, App. 55a, is at odds with this Court's precedent. *United States v. Dominguez Benitez*, 542 U.S. 74, 81 n. 7 (2004); *O'Neal v. McAninch*, 513 U.S. 432, 437-443 (1995).[16]

A. A Trial Court's Unconstitutional Exclusion of Reliable Evidence of a Third Party's Confession to the Offense with which the Accused Is Charged Cannot Be Characterized as Harmless Error.

In all cases considered by this Court, in which reliable evidence of third party guilt was unconstitutionally excluded by trial courts, this Court has found that the error necessitated reversal. *Holmes v. South Carolina*, 164 L.Ed.2d 503, 126 S.Ct. 1727; *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 388 U.S. 14. In these cases, this Court did not discuss whether the unconstitutional trial court rulings were prejudicial; rather, such determinations are implicit in each of the decisions. *Holmes*, 164 L.Ed.2d at 513, 126 S.Ct. at 1735 ("[T]he rule applied in this case by the State Supreme Court violates a criminal defendant's

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[16] It may be that the debate about the proper mode of harmless error review is purely academic in most cases. As Justice Scalia has observed: The "different standards of probability relating to the assessment of whether the outcome of the trial *would* have been different ... *if* omitted evidence had been included[,]" such as the standards set forth in *Chapman* and *Brecht*, represent "ineffable gradations of probability" that are "quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decisionmaking." *United States v. Dominguez Benitez*, 542 U.S. at 86-87 (Scalia, J., concurring in the judgment) (emphasis in the original).

right to have a meaningful opportunity to present a complete defense....[¶] For these reasons, we vacate the judgment....") (internal quotation marks omitted); *Chambers*, 410 U.S. at 303 ("[U]nder the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial. [¶] The judgment is reversed...."); *Washington*, 388 U.S. at 23 ("The judgment of conviction must be reversed.").

Because most types of constitutional error can be deemed harmless in given circumstances, *Arizona v. Fulminante*, 499 U.S. 279, 306-307 (1991) (opinion of Rehnquist, C.J., for the Court), the fact that this Court reversed convictions in *Holmes*, *Chambers*, and *Washington* without any discussion of prejudice reveals that prejudice is implicit when a trial court unconstitutionally excludes reliable evidence of third party guilt. Indeed, it is self-evident that such constitutional error precludes a jury from being able to perform its function of finding the truth and making an accurate determination of guilt or innocence. See *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.") How can a fact-finder determine where the truth lies when facts germane to that inquiry are concealed from the fact-finder?

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In *House v. Bell*, 547 U.S. ___, 2006 U.S. Lexis 4675 (2006), this Court described the reliable and compelling nature of the type of evidence of third party guilt Mr. Fry endeavored to introduce through Ms. Maples' testimony:

> "The confession evidence here involves an alleged spontaneous statement recounted by ... [an] eyewitness[] with no evident motive to lie. For this reason, it has more probative value than, for example, incriminating testimony from inmates, suspects, or friends or relations of the accused."

Id. 2006 U.S. Lexis at *61.

As noted above, the panel majority in the Ninth Circuit's decision in this case expressly found Ms. Maples' proffered testimony to be "reliable[,]" and recognized that the testimony "was material and would have substantially bolstered [Mr.] Fry's claims of innocence." App. 2a (internal quotation marks and brackets omitted). The dissenting member of the panel noted that "Ms. Maples was the only unbiased witness presented by either side[,]" that she "implicated her cousin in the murder for which [Mr.] Fry was on trial[,]" and that "[s]uch testimony is generally recognized as having a powerful impact on jurors." App. 4a-5a.[17]

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[17] "A confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. at 296 (opinion of White, J., for the Court). "Certainly, confessions have profound impact on the jury...." *Id.*

Given the nature of the evidence which was kept from Mr. Fry's jury, the jury's truth-finding function was impaired to such an extent that the jury could not make a reliable determination of Mr. Fry's guilt or innocence. *Rosen v. United States*, 245 U.S. 467, 471 (1918) ("[T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury...."); *United States v. Nobles*, 422 U.S. 225, 231 (1975) ("'The ends of justice would be defeated if judgments were to be founded on partial or speculative presentation of the facts.'") (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)).[18] Furthermore, because the excluded evidence has been found to be reliable, and because the excluded evidence exonerates Mr. Fry, the unconstitutional exclusion of the evidence cannot rationally be treated as harmless.

Finally, this Court's jurisprudence concerning the errors which are properly subject to harmless error review reveals that the type of error which occurred in

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[18] The Compulsory Process Clause was designed to ensure that the truth-finding function of juries would not be impaired in this manner. "[T]he Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury." (*Washington v. Texas*, 388 U.S. at 20.)

this case is not amenable to such review: Trial error is subject to harmless error analysis, because it is "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. at 307-308 (opinion of Rehnquist,C. J., for the Court). The error in the instant case did not occur "during the presentation of the case to the jury...." *Id.* To the contrary, the error consisted of a ruling which was made outside the presence of the jury, App. 48a, 151a-152a, and it resulted in reliable, exculpatory evidence being kept from the jury. Thus, the error cannot be "quantitatively assessed in the context of other evidence presented...." *Id.*

This petition should be granted so that this Court can definitively establish that a trial court's unconstitutional exclusion of *reliable* evidence of third party guilt is not the type of error which can be treated as harmless.

B. A GVR Disposition May Be Warranted in Light of this Court's Recent Decisions in *Holmes* and *House*.

This Court's decisions in *Holmes v. South Carolina*, 164 L.Ed.2d 503, 126 S.Ct. 1727, and *House v. Bell*, 2006 U.S. Lexis 4675, were handed down after the Ninth Circuit's decision in this case, and after the Ninth Circuit denied Mr. Fry's

petition for rehearing en banc. The relevance of these decisions to the questions presented in this petition has been discussed above. Because of the pertinence of these new decisions to the issues presented herein, a GVR disposition may be warranted. See *Stutson v. United States*, 516 U.S. 193 (1996) (*per curiam*); *Lawrence v. Charter*, 516 U.S. 163 (1996) (*per curiam*). Indeed, in *Lawrence*, this Court explained that "intervening developments," including new Supreme Court decisions, may warrant an exercise of this Court's "GVR power[.]" 516 U.S. at 166-167.

C. The State Appellate Court Which Affirmed Mr. Fry's Conviction on Direct Review Would Have Been Constrained to Reverse Mr. Fry's Conviction if It Had {1} Recognized that Mr. Fry's Constitutional Rights Were Violated by the Exclusion of Ms. Maples' Testimony and {2} Properly Assessed the Effect of the Constitutional Violation Under *Chapman*. It Is Unjust to Deny Federal Habeas Relief to Mr. Fry Simply Because of the State Appellate Court's Objectively Unreasonable Failure to Even Recognize the Constitutional Error.

If the state appellate court which affirmed Mr. Fry's conviction had engaged in a reasonable application of this Court's precedent, the court would have found that the exclusion of Ms. Maples' testimony violated Mr. Fry's constitutional rights. Indeed, as noted above, this is the unanimous conclusion of every federal judge who has considered this case. App. 2a, 4a-5a, 52a-54a, 73a-74a.

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Furthermore, had the state appellate court recognized this constitutional violation on direct review, the state court would have been required to apply *Chapman* harmless error analysis. *Brecht v. Abrahamson*, 507 U.S. at 636; *Chapman v. California*, 386 U.S. at 24. And, under that standard, the court would have been constrained to reverse Mr. Fry's conviction. For, the federal judges who have considered this case have not only disavowed the notion that prejudice can be ruled out as a result of the constitutional violation, App. 54a, but also they have recognized that the erroneously excluded evidence was "reliable[,]" and "would have substantially bolstered [Mr.] Fry's claims of innocence." App. 2a (internal quotation marks and brackets omitted).

The federal judges who have treated the constitutional violation in this case as harmless have done so by expressly relying on the *Brecht* standard instead of the *Chapman* standard, App. 2a-3a, 54a-55a, notwithstanding Mr. Fry's position that the latter standard is inapplicable in this case. App. 62a. Of course, the *Brecht* standard is a deferential and more forgiving standard than the *Chapman* standard. The dissenting judge in the Ninth Circuit explained that the error in this case cannot be treated as harmless even under the deferential *Brecht* standard. App. 4a-5a. And, the remarks of the magistrate judge and the panel majority make clear their view that the error could not be deemed harmless under the exacting

Chapman standard. App. 54a (The magistrate judge stated: "[T]his court cannot conclude, as did the state appellate court that 'no possible prejudice' could have ensued as a result of the exclusion of the testimony...."); App. 2a (The panel majority stated that the excluded testimony was "reliable" and "would have substantially bolstered [Mr.] Fry's claims of innocence.") (internal quotation marks and brackets omitted).[19]

Thus, if Mr. Fry is ultimately denied habeas relief in this case, that result will be directly attributable to the state appellate court's unreasonable application of this Court's precedent, which led to that court's failure to review the trial court's error under the *Chapman* standard. Such a result is strikingly unseemly, particularly in light of this Court's assessment in *Brecht* that *Chapman* harmless error analysis need not be applied in § 2254 proceedings due to the duty and presumed ability of state court judges to identify and vindicate violations of defendants' federal constitutional rights. *Brecht v. Abrahamson*, 507 U.S. at 636 (noting that, under Article VI, state courts have a "duty to uphold the Constitution"); *id.* ("State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*....").

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[19] This description by the panel majority of the effect the excluded testimony would have had on the case leaves one wondering how the panel majority could have found the erroneous exclusion harmless under any standard.

It has been established beyond dispute in § 2254 proceedings in this case that the judgment pursuant to which Mr. Fry is now imprisoned was obtained in derogation of Mr. Fry's constitutional rights. The core values which underlie these constitutional rights would surely be disserved by tolerating the constitutional violation simply because of a state appellate court's objectively unreasonable handling of Mr. Fry's case, and because of the principles of finality, comity, and federalism which ordinarily warrant deference in § 2254 proceedings to state court decision-making. *Brecht*, at 635.

D. The Lower Federal Courts Improperly Allocated to Mr. Fry the Burden of Persuasion with Respect to the Question of Prejudice.

In his findings and recommendations in this case, the magistrate judge stated: "[T]he court does find that there has been an insufficient showing that the improper exclusion of the testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict." App. 55a. As noted, the district court adopted the magistrate judge's findings and recommendations in full. App. 73a-74a. On appeal, Mr. Fry argued that the district court had erred by assigning the burden of persuasion to Mr. Fry in this regard. Appellant's Opening Brief at 58, Ninth Cir. case no. 04-16876.[20] However, this issue concerning the allocation of the burden

[20] The briefing of the parties below is voluminous and is not included in the appendices to this petition.

of persuasion in harmless error analysis is not addressed in the Ninth Circuit's opinion. App. 1a-5a.

This Court's precedent makes it explicit that, in applying the *Brecht* standard, the State bears the burden of negating the effect of an error on the outcome of a case. *United States v. Dominguez Benitez*, 542 U.S. at 81 n. 7; *O'Neal v. McAninch*, 513 U.S. at 437-443.

Because the federal judges who have considered this case viewed the question of prejudice as such a close one, App. 8a (the magistrate judge stated "petitioner comes close to demonstrating actionable error"); App. 2a (the panel majority stated that the erroneously excluded evidence "would have substantially bolstered [Mr.] Fry's claims of innocence") (internal quotation marks and brackets omitted); App. 5a (the dissenting member of the panel stated: "I am convinced that the exclusion of Ms. Maples' testimony was not harmless[.]"), this erroneous allocation of the burden of proof probably made the difference in the outcome of the lower federal courts' resolution of this case. Such error should not be a determinative factor in a case that has been plagued throughout by profound constitutional error.

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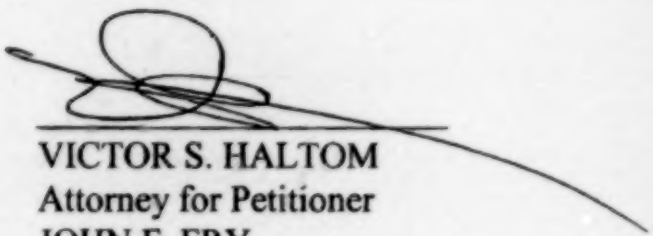
CONCLUSION

Either the petition for a writ of certiorari should be granted, or a GVR order should be issued so as to enable the Ninth Circuit to consider the issues herein in light of this Court's recent decisions in *Holmes* and *House*.

Respectfully Submitted,



VICTOR S. HALTOM
Attorney for Petitioner
JOHN F. FRY

June 20, 2006

APPENDICES

A. Opinion of the U.S. Court of Appeals for the Ninth Circuit (February 20, 2006) 1a

B. Ninth Circuit Denial of Rehearing En Banc (April 25, 2006) 6a

C. Judgment of the U.S. Court of Appeals for the Ninth Circuit (May 5, 2006) 7a

D. Memorandum of Findings and Recommendations of the Magistrate Judge (June 2, 2004) 8a

E. Order of the U.S. District Court for the Eastern District of California, Adopting the Findings and Recommendations of the Magistrate Judge (August 27, 2004) 73a

F. Opinion of the California Court of Appeal, First Appellate District, Division Three (March 31, 2000) 75a

G. Excerpt of Reporter's Transcript of Proceedings in *People v. Fry*, docket no. C34299, California Superior Court, Solano County (April 20, 1995) 145a

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 02 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOHN FRANCIS FRY, Petitioner - Appellant, v. CHERYL K. PLILER, Warden, Respondent - Appellee.	No. 04-16876 D.C. No. CV-01-01580-FCD -ST MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding

Argued and Submitted October 18, 2005
San Francisco, California

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

After two mistrials on account of hung juries, John Fry was convicted of two counts of first degree murder in California Superior Court.[1] His conviction was affirmed by the California Court of Appeal and the California Supreme Court.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[1] Because the parties are familiar with the factual and procedural history we do not include them here except as necessary to explain our disposition.

Fry's petition for federal writ of habeas corpus under 28 U.S.C. § 2254 was denied by the district court. We have jurisdiction under 28 U.S.C. § 2253(a) and we affirm.[2]

The exclusion of Pamela Maples' testimony involved an unreasonable application of clearly established federal law, because her testimony was "material and would have substantially bolstered [Fry's] claims of innocence." *Chia v. Cambra*, 360 F.3d 997, 1003 (9th Cir. 2004). Maples did overhear large portions of a conversation involving her cousin, Anthony Hurtz, in which Hurtz indicated that he had committed a double homicide. Because Maples did hear large portions of this conversation—and because the portions of the conversation Maples did hear involved idiosyncratic facts exactly matching the facts surrounding the murder of Cynthia and James Bell, the victims in this case—we find her testimony to be sufficiently reliable. However, even assuming constitutional error, the exclusion of Maples' testimony was harmless because it did not have "a

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[2] Fry is in custody pursuant to a judgment of a state court. Therefore, the writ of habeas corpus will not be granted unless the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). We review *de novo* the district court's denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus. *Bailey v. Rae*, 339 F.3d 1107, 1111 (9th Cir. 2003).

substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted).[3]

Second, the exclusion of Robert Morse's testimony was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, because, if admissible at all, the excluded evidence was not substantive evidence of a third party's culpability in the charged homicides. Therefore, Morse's testimony was not of significant importance to Fry's third party culpability defense and its exclusion was not constitutional error. *See Chia*, 360 F.3d at 1004. Assuming constitutional error in excluding Morse's testimony, that error was harmless because it did not have a substantial and injurious effect on the outcome of the trial. *Brecht*, 507 U.S. at 637.

AFFIRMED

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[3] Fry contends that this court should not apply the *Brecht* harmless error standard because the state appellate court failed to conduct a meaningful prejudice review. We have held, however, that the *Brecht* standard applies uniformly in all federal habeas corpus cases under § 2254 regardless of the error standard, if any, applied by the state court. *Bains v. Cambra*, 204 F.3d 964, 976 (9th Cir. 2000); *see also Inthavong v. LaMarque*, 420 F.3d 1055, 1059 (9th Cir. 2005).

FILED

FEB 02 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

***Fry v. Pliler*, No. 04-16876**
Rawlinson, Circuit Judge, dissenting:

I respectfully dissent from that portion of the disposition concluding that the exclusion of Pamela Maples' testimony was harmless error under *Brecht v. Abramson*, 507 U.S. 619 (1993).

Using the *Brecht* analysis, constitutional error is harmless unless it has a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638.

In performing the *Brecht* analysis, "we consider the record as a whole," including the strength of the State's case. *Id.*

In my view, the record as a whole militates in favor of a conclusion that exclusion of Ms. Maples' testimony substantially and injuriously affected the jury's verdict in this case.

As the district court noted, this was John Fry's third trial, with the two prior juries having failed to reach a verdict. In this third trial, even in the absence of Ms. Maples' exculpating testimony, the jury deliberated for five weeks before convicting Fry.

Ms. Maples was the only unbiased witness presented by either side. She also implicated her cousin in the murder for which Fry was on trial. Such

testimony is generally recognized as having a powerful impact on jurors. *See Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (noting that testimony of a disinterested witness "would quite naturally be given much greater weight by the jury."); *see also Bailey v. Rae*, 339 F.3d 1107, 1116 (9th Cir. 2003) ("Independent corroboration of the defense's theory of the case by a neutral and disinterested witness . . . can undermine confidence in a verdict.").

Because I am convinced that the exclusion of Ms. Maples' testimony was not harmless, I respectfully dissent.

FILED

APR 25 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN FRANCIS FRY,

Petitioner - Appellant,

v.

CHERYL K. PLILER, Warden,

Respondent - Appellee.

No. 04-16876

D.C. Nos. CV-01-01580-FCD
Eastern District of California,
Sacramento

ORDER

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges D. Nelson and Bea have voted to deny the petition for panel rehearing. Judge Bea has voted to deny the petition for rehearing en banc, and Judge D. Nelson so recommends. Judge Rawlinson has voted to grant both the petition for panel rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for an en banc hearing and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for panel rehearing and the petition for rehearing en banc are DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN FRANCIS FRY,

Petitioner - Appellant,

V.

CHERYL K. PLILER, Warden,

Respondent - Appellee.

No. 04-16876
D.C. No. CV-01-01580-FCD GGH HC

JUDGMENT

MAY - 5 2006
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

Appeal from the United States District Court for the Eastern District of California (Sacramento).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 02/02/06

FILED
MAY - 5 2006
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
MAY 03 2006
BY: _____ Deputy Clerk

FILED
JUN 2 2004
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN FRANCIS FRY,

Petitioner, No. CIV S-01-1580 FCD GGH P

vs.

CHERYL PLILER, Warden, FINDINGS & RECOMMENDATIONS

Respondent.

_____/

I. INTRODUCTION

It should not be surprising that in a case where it took no less than *three* trials to convict petitioner, with deliberations in the third trial taking *five weeks*, that the present habeas action would present complicated issues which necessitate a lengthy discussion. However, while petitioner's counsel is to be commended for his efforts with respect to his primary claims, and although petitioner comes close to demonstrating actionable error in some of his various claims, the petition ultimately falls short.

Petitioner, a state prisoner represented by counsel, is proceeding on an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed on June 24, 2002.[1]

[1]The original petition was filed on August 15, 2001.

Petitioner challenges his 1995 jury trial conviction for two counts of first degree murder; the jury found true the multiple murder special circumstance and the use of a firearm. Amended Petition (AP), p. 11, Clerk's Transcript (CT) 995-97; Answer (Ans.), p. 1. Petitioner was sentenced to life without the possibility of parole plus a term of 35 years (CT 1036-37[2]). For the reasons set forth herein, the petition should be denied.

II. ISSUES

Not even the issues are easily discerned in this action. In his amended petition, several overarching issues are raised with discrete subissues underlying those issues. However, it is less confusing in this lengthy Findings to discretely break out all the issues. The court has identified all discrete issues (as were separately set forth in the traverse) as follows:

A. Admission of character evidence (a prior criminal incident engaged in by petitioner) violated due process;

B. Admission of coerced testimony of witnesses violated due process rights of petitioner (includes "claim" that failure of court to grant evidentiary hearing on issue of coercion violated due process);

C. Petitioner's right of cross examination was unduly restricted with respect to petitioner's brother's testimony (including the area of threats made to the brother by the police);

D. Petitioner was denied his right to present a defense by exclusion of testimony of a witness who overheard a third party confession (Hurtz) to the murders;

E. Petitioner was denied his right to present a defense when the trial court excluded the prior convictions of the "actual killer" (Hurtz);

F. Petitioner was denied his right to present a defense when the trial court excluded evidence of a third party's possession of the murder weapon (actually—evidence that would have impeached a witness that testified the third party did *not* have possession of the weapon);

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[2] Pages 1018 to 1035 of the Clerk's Transcript (CT) are missing from respondent's submission to the court.

G. Petitioner was denied his right to present a defense when the trial court excluded the prior acts of violence of the "actual killer's" accomplice;

H. Petitioner's Sixth Amendment and due process rights were violated when the trial judge directed the jurors to continue deliberating after they had announced a deadlock on the ninth day of deliberation;

I. Petitioner's Sixth Amendment and due process rights were violated when the testimony was read back in a misleading fashion.

III. EXHAUSTION

Review of the merits is delayed by one exhaustion issue. Although there is no question that the coerced testimony of witnesses claim (Issue B, above) was exhausted on its merits, respondent asserts that the subclaim—petitioner's due process rights were violated by the trial court's failing to hold an evidentiary hearing on his coerced testimony allegations—was not exhausted. The court need not determine the exhaustion question because it is clear that the subclaim does not set forth a claim cognizable in federal habeas corpus.

Whether the state trial court held an evidentiary hearing on an evidence preclusion issue (thereby fairly and accurately finding the facts relevant to a ruling on the merits) is only pertinent to the *federal procedural* habeas issues concerning the use of any factual presumption of correctness, 28 U.S.C. § 2254(e)(1) and/or the need for an evidentiary hearing *in federal habeas*. § 2254(e)(2). There is no recognized federal constitutional claim that one has a federal due process right to state court evidentiary hearings on evidence issues. Accordingly, this subclaim should be summarily dismissed which obviates the need for an exhaustion discussion, and permits the court to reach the merits of other issues. 28 U.S.C. § 2254 (b)(2).

IV. AEDPA

The AEDPA applies to this petition for habeas corpus which was filed after the AEDPA became effective. Neelley v. Nagle, 138 F.3d 917 (11th Cir.), citing Lindh v. Murphy,

117 S. Ct. 2059 (1997). The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997).

In Williams (Terry) v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme Court defined the operative review standard set forth in § 2254(d). Justice O'Connor's opinion for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy between "contrary to" clearly established law as enunciated by the Supreme Court, and an "unreasonable application of" that law. Id. at 1519. "Contrary to" clearly established law applies to two situations: (1) where the state court legal conclusion is opposite that of the Supreme Court on a point of law, or (2) if the state court case is materially indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is opposite.

"Unreasonable application" of established law, on the other hand, applies to mixed questions of law and fact, that is, the application of law to fact where there are no factually on point Supreme Court cases which mandate the result for the precise factual scenario at issue. Williams (Terry), 529 U.S. at 407-08, 120 S. Ct. at 1520-1521 (2000). It is this prong of the AEDPA standard of review which directs deference to be paid to state court decisions. While the deference is not blindly automatic, "the most important point is that an *unreasonable* application of federal law is different from an incorrect application of law....[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams (Terry), 529 U.S. at 410-11, 120 S. Ct. at 1522 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. Woodford v. Viscotti, 537 U.S. 19, 123 S. Ct. 357 (2002).

The state courts need not have cited to federal authority, or even have indicated awareness of federal authority in arriving at their decision. Early v. Packer, 537 U.S. 3, 123 S. Ct. 362 (2002). Nevertheless, the state decision cannot be rejected unless the decision itself is contrary to, or an unreasonable application of, established Supreme Court authority. Id. An unreasonable error is one in excess of even a reviewing court's perception that "clear error" has occurred. Lockyer v. Andrade, 538 U.S. 63, 75-76 , 123 S. Ct. 1166, 1175 (2003). Moreover, the established Supreme Court authority reviewed must be a pronouncement on constitutional principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on federal courts. Early v. Packer, 537 U.S. at 10, 123 S. Ct. at 366.

However, where the state courts have not addressed the constitutional issue in dispute in any reasoned opinion, the federal court will independently review the record in adjudication of that issue. "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

V. BACKGROUND

A. Procedural Background

The First District Court of Appeals (division three) succinctly summarizes the convoluted procedural background of this case:

> Appellant was charged in February 1993 with three counts of first degree murder of three victims (James Bell, Cynthia Bell, and Jason Gibeau), with allegations of the special circumstance of multiple murder and of firearm use. (Pen. Code, §§ 187; 190.2, subd. (a)(3); 12022.5.)
>
> Unless otherwise indicated, all further statutory references are to the Penal Code.
>
> In May 1993, appellant's section 995 motion to set aside the information was granted with respect to the charged murder of Gibeau.
>
> Appellant's first two trials resulted in mistrials due to juror

> deadlock.[3] Appellant's third jury trial commenced on February 24, 1995. On June 8, 1995, the jury convicted appellant of first degree murder on both counts, and found true the allegations of firearm use and multiple murder special circumstances. He was sentenced to life in prison without the possibility of parole, plus a term of 35 years.

Exhibit (Exh.) D to Answer, First District Court of Appeals unpublished opinion, March 31, 2000, p. 34.

Upon petitioner's petition for review to the California Supreme Court of the appellate court's denial of his writ application, the petition was denied on July 12, 2000. Exh. F to Answer. The original petition in this matter was filed in this court on August 15, 2001. Counsel was appointed by order filed on August 28, 2001. By order filed on October 5, 2001, petitioner was directed, if he chose to amend, to file a first amended petition within 120 days. Following several grants of requests for extension of time (see Orders filed on January 31, 2002, March 26, 2002, June 10, 2002, and June 17, 2002, the first amended petition was filed on June 24, 2002).

Petitioner had three separate jury trials before he was convicted. Amended petition (AP), p. 2, RT 5337-5338. In the first trial, the jury was deadlocked with a 6 to 6 split:

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[3]Petitioner sets forth the dates of the two prior deadlocked trials: the first jury trial on two murder counts and the multiple murder special circumstances allegation began on February 22, 1994 and was declared a mistrial on April 4, 1994. AP, p. 10, CT 222-257, 374. The second jury trial began on August 24, 1994 and concluded on October 21, 1994, when a mistrial was declared due to another deadlocked jury. AP, p. 10, CT 510-524, 530-552, 557-559, 569-570, 575-578, *664-671, 683. (*Note: pages 660-667 of the clerk's transcript do not appear to be included in the record before this court).

six voting to acquit, six voting for conviction.[4] The second trial ended with a 7 to 5 deadlock in favor of conviction. AP, p.2, CT 664-667.[5]

The presentation of evidence in the third trial lasted eleven (11) weeks; jury deliberations went on for five (5) weeks. AP, p. 2. Numerous votes were taken with the jurors unable to reach a unanimous verdict. Id. There were numerous testimony readbacks requested by jurors. Id. Jurors advised the court at one point that they were split 7-5. AP, p. 2, RT 5154.6. Only two jurors at that time believed that a verdict could be reached. AP, pp. 2-3, 10, RT 5154.-5154.8. When the jury sought more information about the reasonable doubt standard, they were referred to the instruction they had been provided. AP, p. 3, RT 5154.9. When the trial judge told jurors to return for further deliberations, he also informed them that he would check with them again the following day but failed to do so. AP, p. 3, RT 5154.9, 5233. More than a week later, at least one juror showed concern that she would lose her job if deliberations did not come to an end; a verdict was eventually reached, finding petitioner guilty on all charges. AP, p. 3, RT 5233, 5337-5338. In Exhibit B to the amended petition, petitioner includes a letter from petitioner's trial counsel, the former (now deceased) director of the Solano County Conflict Defender's Office, Lorraine E. Voss, which petitioner asserts demonstrates his trial counsel's abiding conviction that he is innocent of the double homicide. AP, p. 3 and Exh. B.[6]

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[4]According to petitioner's counsel, the reporter's transcript (RT) of the first trial contains some 1,758 pages of witness testimony; the second trial's RT contains 2,722 pages of witness testimony; the third trial, at issue here, has a RT including 5,377 pages of trial proceedings, as well as a clerk's transcript (CT) of 1048 pages. AP, pp. 3, 9 fn.18.

[5]As previously noted (see footnote 3), these pages are among those missing in the court transcript submitted to this court.

[6]In a March 5, 1996 letter to petitioner's appellate counsel wherein Ms. Voss turns over the case file, she concludes: "Going through this trial in front of Judge Harrison (twice) was the most awful experience of my life. I doubt if the trial transcripts in this case could truly reflect what an awful experience it was. It was only my faith in Jay Fry and his innocence that kept me going." Exh. B to AP. As Exh. E, petitioner includes trial counsel's preliminary information re: appeal, another intensely critical (also without setting forth specific factual underpinnings)

B. Factual Background

Petitioner notes that the relevant facts of the case have been extensively set forth in the state court of appeals slip (unpublished) opinion. AP, p. 12, fn 28. This court's independent review has confirmed the accuracy of the facts/record as set forth in the state appellate court decision:[7]

> Between 6:15 and 6:30 a.m., on October 27, 1992, the bodies of James and Cynthia Bell
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> > [Footnote 1:] At various points during the trial, Cynthia Bell was also referred to as "Cynthia Edon." For consistency, throughout this opinion we will refer to the female victim in this case as Cynthia Bell.
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> were discovered in a white 1978 Camaro automobile parked on the dirt shoulder of Interstate 505 near the freeway intersection with VacaValley Parkway. Both victims had been shot. Cynthia's body was on the driver's side, with the window down. The victim's left arm was resting on the door sill, and her body was turned to the left as though she had been talking to someone outside the vehicle. According to witnesses who first saw the body, the upper portion of Cynthia's head was "missing." James's body was in the front passenger seat, slumped toward Cynthia's body. The car keys were in the ignition and turned to the "on" position. However, the engine was not running; the gas tank was empty, and the battery was dead. Black, sooty carbon deposits were visible directly below the tailpipe, indicating the car had been idling for some period of time at that location. There was an empty paper soft-drink cup from a Chevron minimart between James's thighs.
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> When police officers and paramedics arrived at the scene between 7:00 and 7:30 a.m., they found the bodies "ashen," "very cold," "very firm," and mottled or marbled in appearance. Pictures were taken of the victims' bodies and the crime scene between 8:30 and 10:00 a.m., before the bodies were moved or disturbed. By the

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assessment by Ms. Voss: "This trial was a complete nightmare both the 2nd and 3rd time. The judge for the last 2 trials was something I can't put down on paper. The two district attorneys involved were not of sterling character. In fact[, in] the last trial the district attorney's office attempted to manipulate phoney [sic] charges against defense counsel in order to win! The last trial in particular was a twilight zone experience." The record shows that Ms. Voss was commended by the trial court for her efforts in defense of petitioner (through the several trials). AP, p. 3, n. 5, RT 5346. The court notes that the prosecutor who had inherited the case was also commended. RT 5346.

[7]Petitioner's counsel also quotes from this summary. See AP, p. 12.

time the coroners removed the victims from the car between 11:00 and 11:30 a.m., the bodies were totally rigid and stiff, and retained their postures when moved.

Three bullets were recovered: one from James' cheek; a second from the passenger door; and a third from the rear floor of the Camaro behind the passenger seat. Dr. Aaron Lipton, the pathologist who performed the autopsies on the victims, testified that Cynthia had sustained "massive damage" to the upper part of her face and skull, "with a large area of these areas of the face and skull absent . . . [a]nd a large portion of the brain material beneath the skull also absent." Dr. Lipton opined that the gunshot wound to Cynthia's head, which was the cause of her death, was the result of someone shooting her in the face from only inches away. Under the circumstances, the shooter "[p]ossibly" would be "covered with blood and tissue" from the victim. James had a total of eight bullet wounds on his head, chest, back and wrist; death resulted from the wounds to the head and lungs. Dr. Lipton opined that James' wounds were caused by shots fired at him from the driver's side of the car.

Based on the photographs of the victims taken after their bodies had been taken out of the Camaro, Dr. Lipton opined that they appeared to be "in full rigor mortis," a condition which, in a temperate climate like that present at the time and location of the crime, usually develops "between six and twelve hours" after death and then subsides within 36 hours. Rigor mortis would manifest by a "very firm" condition of the muscles directly under the skin. At the time he performed the autopsies, beginning at approximately 8:30 a.m., on October 28, 1992, Dr. Lipton noted only "mild" or "moderate" rigor mortis remaining in the victims' bodies. On cross-examination, Dr. Lipton testified that he originally estimated the victims had died three or four hours before the bodies were found, based on the pictures and the descriptions given by the police investigators. However, he also testified there are many different variables affecting the accuracy of any estimate of the time of death based on rigor mortis.

Several witnesses testified to having seen an older-model white Camaro, matching the description of the victim's car, parked at the crime scene between approximately 8:30 and 10:00 p.m. on October 26, 1992, in the same location and position where it was subsequently found with the victims' bodies the next morning. At least four different witnesses also described seeing an older-model pickup truck with a light-colored camper shell parked near the Camaro at some point during this time period.

Two other individuals testified that they encountered the victims and their white Camaro at a nearby convenience store sometime between 8:40 and 9:00 p.m. on the evening of October 26, 1992. Both witnesses testified they saw James talking on a pay

> telephone, and heard Cynthia say something referring to "Leroy." Neither witness could tell whether Cynthia was talking to James about someone else named "Leroy," or addressing James by his own middle name of "Leroy." A third witness saw both victims sometime between 9:30 and 10:00 p.m. on October 26, 1992, at the Chevron minimart where she worked as a cashier. James purchased a soft drink at the time.

Exh. D to Answer, First District Court of Appeal decision, pp. 2-4.

VI. DISCUSSION OF CLAIMS

A. Trial Court Violated Petitioner's Fourteenth Amendment Rights to Due Process and to a Fundamentally Fair Trial by Erroneous Admission of Prosecution's Highly Prejudicial Character Evidence (Arleen Murphy Incident)

Petitioner contends that he has been deprived of due process and subjected to a fundamentally unfair trial by the trial court's having allowed, over defense objection, testimony about a previous incident involving petitioner to prove "motive, opportunity, intent, preparation, plan, knowledge, identity." The incident involved a witness named Arleen Murphy who charged that she had been threatened by petitioner within two days of the double homicide at issue. AP, pp. 33-34; Answer, pp. 7-8; Traverse, p. 31.

Petitioner understands that a violation of state evidence law does not in itself equate with a constitutional violation. The Supreme Court has reiterated the standards of review for a federal habeas court. Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475 (1991). In Estelle v. McGuire, the Supreme Court reversed the decision of the Court of Appeals for the Ninth Circuit, which had granted federal habeas relief. The Court held that the Ninth Circuit erred in concluding that the evidence was incorrectly admitted under state law since, "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." Id. at 67-68, 112 S. Ct. at 480. The Court re-emphasized that "federal habeas corpus relief does not lie for error in state law." Id. at 67, 112 S. Ct. at 480, citing Lewis v. Jeffers, 497 U.S. 764, 110 S. Ct. 3092, 3102 (1990), and Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 874-75 (1984) (federal courts may not grant habeas relief where the sole ground

presented involves a perceived error of state law, unless said error is so egregious as to amount to a violation of the Due Process or Equal Protection clauses of the Fourteenth Amendment). The Supreme Court further noted that the standard of review for a federal habeas court "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States (citations omitted)." Estelle v. McGuire, 502 U.S. at 68, 112 S. Ct. at 480. The Court also stated that in order for error in the state trial proceedings to reach the level of a due process violation, the error had to be one involving "fundamental fairness," Id. at 73, 112 S. Ct. at 482, and that "we 'have defined the category of infractions that violate "fundamental fairness" very narrowly.'" Id. at 73, 112 S. Ct. at 482. Habeas review does not lie in a claim that the state court erroneously allowed or excluded particular evidence according to state evidentiary rules. Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991).

Background

Arleen Murphy's testimony is contained in the reporter's transcript (RT) from page 1185-1219; 1234-1349.[8] The court again borrows from the state court appellate decision

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[8]Although Murphy also testified that petitioner threatened to kill the Bells (RT 1256), the murder victims in this case, that testimony, as respondent notes, and petitioner concedes, is not at issue within this claim(Ans., p. 8; Traverse, p. 31, fn. 11), nor, specifically, is the testimony by another witness, Lynn Ruiz, witness Arleen Murphy's aunt, which, in its relevant portion, is summarized by the state appellate court as follows:

> Lynn Ruiz, Murphy's aunt, had been friends with victim Cynthia Bell for 15 years, and had known James Bell for about 5 years. On October 24, 1992, she saw Murphy and appellant at the gas station where she was working. Murphy appeared "nervous" and "antsy," like she was "in a hurry or bothered or something." At approximately 1:30 p.m. on October 26, 1992, Ruiz received a page from a telephone number she did not recognize. When Ruiz returned the call, appellant identified himself, stated he had asked Murphy to place the page for him, and said he wanted to talk with Ruiz about Cynthia. Appellant gave Ruiz his address and asked her to stop by his home after she got off work. Ruiz agreed.
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> .....
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> Appellant told Ruiz he had been upset with Murphy because he thought she was involved in a conspiracy with Bernal and others "to rip him off also," and described the incident in which he had taken "her for a ride out to the country," "scared her and threatened

for an accurate summary of the facts that underlie this claim (any modification is by way of footnote):

> Several prosecution witnesses testified to appellant's erratic behavior during the weeks prior to the murders. Arleen Murphy had known appellant for 32 years, although she had lost touch with him for about 10 years until meeting him again in October 1992.[9] On October 24, 1992, appellant drove Murphy to Davis in his blue truck with a white camper shell on it.[10] As he "always" did, appellant had a gun in a case on the dashboard of his truck. He was also carrying a second gun in his belt. After driving Murphy out a back road and stopping in an isolated location on a levee, appellant told Murphy he was upset because he thought she was in league with their mutual acquaintance Ryan Bernal to steal $1,300 from him, and it was time for her "to go to sleep." Murphy tearfully tried to tell appellant she had no reason to steal from him. Saying he "had to show somebody up north that he had killed" her, appellant held his gun out of the window and fired two shots into the air. Appellant then told Murphy "he was going to get to the bottom of why . . . he was being told [Murphy] was going to steal" his money. Then appellant drove Murphy back to a gas station where Murphy's aunt, Lynn Ruiz, worked. Appellant again told Murphy "[s]ome people up north" were supposed to think she was dead, and to stay in hiding for a couple of days "so he could get to the bottom of this."

Exh. D to Answer, pp. 4.

> her," and "took his gun and told her he was going to blow her away . . . if she didn't explain . . . ." He had pointed his gun at Murphy's head, and had then fired "a couple shots out the window to scare her or something." Appellant told Ruiz that Murphy and Bernal "had to prove their loyalty." He "wanted to blow everybody away," and had only refrained from killing Murphy because he had "known her for 20 years" since they "went to school together."

Exh. D to Answer, pp. 5-6.

[9]On cross-examination, the undersigned notes, Ms. Murphy clarified that she and petitioner had both grown up in Dixon and had known each other since kindergarten and elementary school, riding the same bus over a ten-year period. RT 1266-1267.

[10]Petitioner notes that Murphy testified that she ran into petitioner by happenstance on October 24, 1992 in the Lucky's supermarket lot in Davis; petitioner testified that Murphy called him to pick her up and give her a ride home to Dixon from Davis. AP, p. 33, RT 1190, 1269; RT 2845. Also in the record, on cross-examination of Murphy, her prior testimony in a preliminary hearing in January of 1993 was read into the record wherein Murphy had testified that she had called petitioner for a ride. RT 1270-71.

> Petitioner offered his own version of the Arleen Murphy incident at trial: Appellant acknowledged driving Murphy out into the country on October 24, 1992. He claimed he was merely taking the "rural route" to Davis. According to appellant, Murphy was "hysterical," so he simply let her talk for a while. Then he began to question her about a tape recording he had heard of a suspicious conversation between Murphy and Bernal. Appellant denied threatening to kill Murphy at any time or pointing a gun at her. According to appellant, he simply "decided to play a little game," and shot his gun out of the truck window twice. Appellant next saw Murphy on the morning of October 26, when, according to him, she called to ask him to pick her up at a friend's apartment in Davis. When he arrived, he became irritated because no one was there. He kicked the door, and it "flew open." He then went in and sat on a couch, thinking "somebody would show up sooner or later." When Murphy arrived, appellant left a note apologizing for the damage to the door.

Exh. D to Answer, pp. 21-22.

Petitioner asserts that trial counsel's motion in limine to exclude evidence of the Murphy shooting incident correctly characterizes any such evidence as "a propensity argument in disguise." AP, p. 34, citing CT 813. Petitioner sets forth the following portion of defense counsel's argument before the trial court:

> The only issue in the case is the identity of the perpetrator. Motive is not an issue. The defendant has never denied that he had reasons to be upset with the female victim because she attempted to burglarize his home. The issue of murder is uncontested ... A theory that the incident in the remote area shows how the defendant deals with people he believes have stolen from him is a propensity argument in disguise. The argument more properly put is that the defendant when faced with people who attempt to steal from him has the propensity to act with violence or threats of violence. The courts have consistently found that evidence of other crimes or misconduct is inadmissible to prove propensity or disposition.

AP, p. 34, CT 813-14.

> Petitioner quotes the prosecution's argument from the reporter's transcript: [The incident is] very relevant in terms of 1101(b), in terms of the types of threats which are being made and the reason why they were being made. The time span, of course, is within a matter of a couple of days of the murders. It's alleged that the murders of the Bells...was a result [of[... a theft, or at least in part an alleged theft of narcotics by them from the defendant, which is the same complaint which the defendant had to Ms. Murphy[.] ... [T]he defendant's response to Ms. Murphy was the same as it's alleged

> with the Bells, that he took the gun, the same gun,... took the– confronted the individuals in an isolated spot, and threatened to kill them, and in fact did so with the Bells.

AP, p. 35, RT 468.

Petitioner contends that the prosecution's reliance on Cal. Evid. Code 1101(b) was "token." AP, p. 35. The record indicates that the prosecution offered, in part, the following rationale for the testimony at issue:

> [I]t goes to showing the defendant's motive, intent preparation,...and identity as to what happened a couple of days later to the Bells.
>
> [W]hat we have...is this incident happens within a couple of days of the killing of the Bells. It is related to what the defendant perceived to be an attempt by Arleen Murphy and perhaps Ryan Bernal to steal methamphetamine from him.

RT 477.

Petitioner points to the closing argument wherein the prosecutor allegedly stressed the Murphy incident to persuade jurors to view petitioner as "a menacing and evil man" based on that event—the kind of man capable of committing the heinous murders of this case. AP, pp. 35-36, RT 5008-5009.[11]

In its unpublished decision, the First District Court of Appeal analyzed the issue as follows:[12]

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[11] "You have that terrible ride in the country. Arleen Murphy, think back to her. Talking about demeanor, one of those palpable, real things in this courtroom was her presence on the witness stand. As she talked about her dealings with the defendant and that ride in the country and being at his house on that Monday and that fear which was still in here two-and-a half years afterwards was as real as anything else. You heard her talk about the statements the defendant was making right up to that Monday when she's over there... She was afraid the night of the ride in the country when her aunt, Lynn Ruiz, saw her. She was more afraid that night, that Monday night, because she knew what was going to happen. She knew just as sure as the defendant had told her on that Saturday he was going to kill her, that when he said he was going to go and kill the Bells, he meant it, and she was afraid. She was relieved that it was not her." RT 5009.

[12] In conducting an AEDPA analysis, it is the state court's "last reasoned decision," which in this case is the unpublished opinion of First District Court of Appeals, that is to be examined. Benn v. Lambert, 283 F.3d 1040, 1052 n. 7 (9th Cir. 2002).

> In a corollary to the preceding argument, appellant urges that because his proffered "bad acts" evidence against Borelli was excluded, the trial court should also have excluded the evidence of appellant's threatening behavior toward Murphy. There is no merit to the contention.
>
> The crucial difference between the two situations is both obvious and determinative. As seen, there was no competent evidence proffered concerning Borelli's alleged prior threats or misdeeds against third persons. On the other hand, Murphy herself testified at length about how appellant took her for a long drive along deserted country back roads, stopped his pickup truck in an isolated location, threatened her life over a drug and money dispute, fired his .357-magnum out of the window, and told her he "was going to get to the bottom of this." Murphy's direct testimony about appellant's words and actions toward her indisputably distinguishes this incident from those alleged by appellant of Borelli.
>
> By the same token, there is no question the evidence of appellant's behavior toward Murphy was admissible to prove motive, opportunity, intent, preparation, plan, knowledge and potential identity. The incident evidenced appellant's practice of using his gun to threaten people over drug and money disputes, his method of going to an isolated spot to do so, and his stated desire and intent to kill those who he perceived as cheating him. This incident, occurring only two days before the subject murders, clearly demonstrates motive, plan, intent and identity. There was no error or abuse of discretion in admitting this evidence.

Exh. D to Answer, pp. 54-55.

Petitioner relies on the pre-AEDPA case of McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993) which did hold that unwarranted and unduly prejudicial admission of propensity evidence constituted a due process violation. Id. at 1385. McKinney understood that the Supreme Court had left "unanswered" the question: "When does the use of character evidence to show propensity constitute a violation of the Due Process Clause?" Id. at 1384. McKinney did cite to federal criminal cases which recognized the disfavored nature of character evidence,[13] but none had gone so far as to equate admission of character evidence with a federal constitutional

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[13]Interestingly enough, the disfavored character propensity evidence has nonetheless found favor in sexual assault cases. See United States v. Sioux, 362 F.3d 1241, 1243-44 (9th Cir. 2004).

violation. The U.S. Supreme Court has, in fact, specifically left that question open. "Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." Estelle v. McGuire, 502 U.S. 62, 75 n.5, 112 S. Ct. 475, 484 n.5 (1991). Because violation of clearly established law as pronounced by the *United States Supreme Court* is the sine qua non for an AEDPA violation, see Holgerson v. Knowles, 309 F.3d 1200, 1202 (9th Cir. 2002) (habeas relief not warranted if due process violation not clearly established by the Supreme Court), and such pronouncement is not available for the character/propensity evidence issue, petitioner is left to claiming that the interpretation of California law by California courts was wrong.

However, the record of this case discloses that the state courts did indeed interpret their law as allowing the use of the asserted character evidence of which petitioner complains. Because this court may not second guess the state courts on application of their law (except in circumstances demonstrating an avoidance of a federal constitutional rule), see Estelle, supra, at 502 U.S. at 67-68, 112 S. Ct. at 480; see also Belmontes v. Woodford, 350 F.3d 861, 888 (9th Cir. 2003), there remains nothing for this federal court to adjudicate. That is, in the absence of a recognized federal constitutional principle at odds with the state law, see, e.g., Crawford v. Washington, __U.S.__, 124 S. Ct. 1354, (U.S.Wash. Mar 08, 2004) (Confrontation Clause does not permit "prior testimony" hearsay evidence not subject to cross-examination even if permitted by state law), this court's AEDPA analysis is over. This is not a situation where the state courts conceded error but found the error to be harmless. In such a situation, it would be possible for the federal courts to review the evidentiary error for fundamental unfairness, but this case does not present the issue.

Accordingly, the state courts' decision on the admissibility of the character evidence under state law is the first and last word on this claim. The claim herein should be denied.

B. Trial Court's Admission of the Coerced Testimony of Prosecution Witnesses Shannon Paul Nissen, Edgar Fry and Deborah Kathleen Mathies Violated Fry's Right to Due Process

Petitioner claims that by allowing the testimony of "[t]he three most critical" prosecution witnesses without first conducting an evidentiary hearing to evaluate the claim of coercion, the trial court violated petitioner's Fourteenth Amendment due process rights. AP, p. 46. Trial witnesses Nissen, Fry (petitioner's younger brother) and Mathies testified (Mathies' testimony was by way of "readback," rather than live testimony (RT: 1934))[14], inter alia, that petitioner came home on the evening of October 26, 1992 with "blood on his person, clothing and effects"; all three, along with a jailhouse informant, also testified that petitioner confessed to the killings. AP, pp. 18-19, fns. 47, 48; citing RT 1682-1688; 1752-1759; 1962-1969; 1971-1972; 2010-2015.

The state court of appeals decision fairly sets forth the underlying facts of this claim:

> Kathleen (Debbie) Mathies's testimony at an earlier trial was introduced through reading a transcript.
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> > [Footnote 2] In connection with Mathies' testimony, the trial court told the jury: "Counsel and the Court have been going over a transcript of the prior testimony in September of 1994 of the witness Debbie Mathies. We had anticipated that Debbie Mathies would be here earlier this week, and then even as late as today, and counsel have agreed that we can read her testimony and make a finding that she's unavailable for trial because of her voluntary use of drugs and unable to testify. And the fact that she is unavailable is in no way connected to any acts or influence of the defendant, Mr. Fry. This lady is unavailable for the reasons of her own voluntary use of drugs."
>
> Mathies testified that she was alone with appellant in his house a "couple" of days before the murders when someone knocked on the door. Mathies could see through a window that it was Cynthia

[14] It was stipulated that Debbie Mathies was unavailable for trial due to her own voluntary use of drugs and her failure to appear was not in any way related to petitioner. RT 1943-1944.

> Bell, and she informed appellant of that fact. Appellant told Mathies not to answer the door. Mathies went upstairs to see appellant in his bedroom, and closed the bedroom door. Cynthia went around to the back of appellant's house and entered through a sliding glass patio door. She then came upstairs and opened appellant's bedroom door. Cynthia appeared "shocked" and "surprised" to find that someone was there, and said she just wanted "to see what was going on" at the house. After a few minutes, Cynthia left. Later, Mathies overheard appellant tell Ringler that he was going to kill Cynthia because "she did him, wrong" over "[d]rugs and money." Mathies was also present at appellant's house on October 26, 1992, the day of the murders. At some point that day, she again heard appellant say he was going to kill Cynthia, and complain that Cynthia "owed him money for drugs, and they are lying and doing him wrong." Mathies had been using methamphetamine, marijuana and alcohol during the entire time period at issue.

Exh. D to Answer, pp. 7-8.

> In addition to Murphy, Ruiz, and Mathies, three other witnesses-Shannon Nissen, David Sparks and Edgar Fry-testified about appellant's actions in the days leading up to and including October 26, 1992, the date of the murder. A few days before the killings, appellant informed Nissen that Cynthia owed him $800 for drugs, and that Cynthia had told his girlfriend Ringler that appellant was sleeping with Cynthia. Appellant "wasn't happy" about this. Appellant's brother, Edgar Fry, testified that during the day on October 26, appellant told him that "a day or so before this time" Cynthia had come into his residence without permission, and he had caught her coming up stairs. Appellant appeared "[i]Irritated"; he told Edgar he believed Cynthia had intended "[t]o steal his drugs." Appellant had a .357 revolver which he "usually" took with him whenever he left the house, carried in a soft tan-colored canvas case.
>
> On October 26, 1992, Nissen was at appellant's residence with appellant, Bernal, Murphy, appellant's brother Edgar, and Ringler and her two girls. Victims Cynthia and James Bell were also present for some period of time during the day. In addition, Sparks and his friend Jason Gibeau arrived at some point in the evening in a dark minitruck. Sparks was carrying a .38-caliber pistol and approximately $1,000 in cash, because he was interested in purchasing an ounce of methamphetamine. There was some discussion between Sparks and appellant about the latter purchasing Spark's gun, but no sale of the gun took place. There was also some discussion of purchasing drugs at appellant's house, but Sparks declined because he already had a deal set up elsewhere. After about 30 minutes, Gibeau and Sparks left in Gibeau's truck. Bernal asked appellant if they were meeting at "505." Appellant replied, "That will work." Shortly thereafter, between 7:00 and

7:30 p.m., appellant retrieved his gun, and he and Bernal left in appellant's truck after telling Edgar he "was going to go make a drug deal, do some business." At some point thereafter, Cynthia and James Bell also left appellant's house.

> [Footnote 3] Like much of the testimony in this case, there was some conflict in the witnesses' recollection of when the victims arrived at appellant's house on October 26, 1992, and when they left. As seen, Murphy testified the Bells arrived at approximately 5:30 p.m. shortly after Ruiz's departure, and she did not see them leave. Nissen testified that Cynthia and James Bell were present at appellant's house during the afternoon, and that they left about half an hour after appellant left with Bernal. On the other hand, Edgar Fry testified that the Bells were not at appellant's residence when he arrived there at approximately 5:00 p.m., and did not show up until 30 to 45 minutes after appellant left with Bernal. According to Edgar, the victims stayed for another 30 to 45 minutes and then left.

Edgar testified that Cynthia told him she was going to meet appellant near the "Wild Oates" store. The victims left in their automobile, a light-colored 1970's Camaro.

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Both Nissen and Edgar Fry testified that Bernal returned to appellant's house sometime later in the evening, stayed for a few minutes, and then left again. Hours later that night appellant returned, driving his light blue pickup truck with the camper shell on it. Nissen, Edgar, Mathies, and Ringler were all at appellant's house when he returned. Edgar, who was not wearing a watch, estimated that it was approximately 10:30 p.m. when appellant returned.

Nissen, Edgar and Mathies each gave somewhat differing accounts of appellant's actions and appearance upon his return home. Nissen testified that appellant was wearing a T-shirt, blue jeans and tennis shoes, and was carrying his gun case. According to Nissen, there were spots of blood on appellant's shirt, his shoes, his forehead, the gun case, and "maybe his pants." Appellant appeared "tired" and "kind of nervous"; he went to the kitchen, wiped his face and forehead with a towel, and then walked up to his bedroom. Edgar testified that appellant was wearing "[p]ants with no shirt," and carrying a "satchel or briefcase." He immediately went "straight upstairs" and into the bathroom off the master bedroom, from which Edgar heard running water. In response to Edgar's question, appellant said he had taken his shirt off because

there was blood on it. Edgar saw a large spot of blood on appellant's pants. Mathies saw appellant drive up and then sit in his truck for a while before coming in the house and going upstairs to the bathroom, where he washed blood off his hands. Mathies could not remember whether appellant was wearing a shirt.

Nissen, Mathies, Edgar and Ringler all followed appellant upstairs to his bedroom. Mathies testified that after coming out of the bathroom, appellant said that he had "killed her," and "had to do James, too." He reported that "[h]e blew their heads off with a gun," and that Cynthia's head "looked like spaghetti." He had shot James Bell "a couple of times in the back" after missing with his first shot. According to Nissen, appellant "kind of smiled" and asked him if he "had ever seen what a .357 does to someone's head at close range." When Nissen shook his head "[n]o," appellant said "It's not pretty." Referring to Cynthia Bell, appellant stated "we wouldn't have to worry about her anymore." When appellant announced that the Bells "were taken care of," Edgar asked him if he "had done" Cynthia. Appellant said, "Yes." According to Edgar, appellant said he told Cynthia "she shouldn't have fucked with him," and told James "he was sorry" before shooting him. Like Nissen, Edgar also testified that appellant commented that "you couldn't imagine what a .357 would do . . . [t]o somebody's skull." Appellant pulled a nickel-plated .357 gun out of the gun case and unloaded it. The gun contained four spent shells and two live shells, which both Edgar and Nissen described as .357 "wadcutters." Appellant asked Nissen if he wanted to clean the gun. When Nissen declined, appellant handed the gun to Edgar, who cleaned it for him. Both Nissen and Edgar testified they saw what appeared to be blood on the gun. In addition, Mathies saw blood on appellant's wrist watch, which appellant also asked Edgar to clean off.

Both Mathies and Edgar Fry testified that appellant and Edgar discussed what to do with appellant's bloody clothes. Edgar told appellant that if he "did do it," then "he better get rid of his clothes." Edgar volunteered to take them with him when he left. At first appellant resisted the idea, because he had few pairs of pants and the ones he was wearing "were good pants." Eventually appellant gave Edgar a paper bag, which Edgar assumed contained appellant's clothing. He disposed of it in a dumpster. He knew that he could get in trouble for destroying evidence, but did it because he wanted to help his brother. Appellant left the house again around 11:30 p.m., saying he was going to the Chevron station to "make a transaction." Appellant returned about 20 minutes later. Edgar left appellant's house between 1:00 and 2:00 a.m. that morning.

Nissen spent the night at appellant's house. The next morning, appellant asked him to help take the camper shell off appellant's pickup truck. Appellant was in a hurry; he told Nissen he "didn't

> want people to recognize the truck." While they were working on the truck, appellant told Nissen "that he shot [Cynthia Bell] and her boyfriend." Appellant described shooting Cynthia once in the head from the driver's side of the car, after which James Bell had turned toward appellant, put his hands in the air, and said "What the fuck are you doing." Appellant then demonstrated how he had shot James three times, " 'pop, pop, pop.' " Nissen did not report appellant's confession when the police questioned him about the murders on October 28 as they served a search warrant on appellant's residence, because appellant was his friend, and he "didn't want him to get in trouble." In addition, Ringler and appellant both told Nissen that, if asked, he should say appellant was home at the time of the murders. A "couple days" later the police returned to the house to talk with Nissen, and threatened to arrest him for possession and use of methamphetamine. At that point, Nissen decided to tell the police what he knew in order to avoid arrest. On cross-examination, Nissen admitted reading press accounts of the killings before he spoke to the police. However, he testified he never felt threatened by the police to tell anything but the truth, and that he did tell the truth.
>
> Like Nissen, Mathies did not contact the police despite her knowledge of appellant's involvement in the murders. She testified she did not contact the police and initially denied knowing anything because she "was scared." She denied changing her story because the police had threatened to arrest her and take her children away. When she first heard appellant threaten to kill Cynthia Bell, Mathies did not believe it, and simply thought it was "an expression." On cross-examination, Mathies testified that Nissen was not in the bedroom when appellant was cleaning up after the killings.
>
> Edgar Fry testified that during a conversation with appellant after the police first searched appellant's residence and seized his clothing, appellant told Edgar that he had thrown the .357 into the bushes at the Chevron station after he drove by his house and saw police activity there. Appellant said someone named "Mike" picked up the gun for him. A few days after the killing, while they were working on a car together, appellant told Edgar that he had the power "[t]o give or take life." Appellant told Edgar to "[j]ust keep [his] mouth shut" if contacted by the police. Edgar intended to do so, until contacted by the police and offered immunity for telling what he knew. The police never asked him to say anything but the truth, and never threatened him other than to tell him what he "was up against."

Exh. D to Answer, pp. 8-13.

Petitioner contends that defense counsel presented the trial court with substantial evidence that Nissen, Fry and Mathies had been coerced by law enforcement and by the

prosecution, in the form of transcripts of recorded statements to police and transcripts of testimony from prior judicial proceedings. AP, p. 46, citing CT 710-746; 758-777. Petitioner accurately summarizes the substance of defense counsel's in limine motion before the trial court to exclude the testimony of the three witnesses at issue:

> October 26 or 27, 1992: The Bells are killed. "The only person who claims to have witnessed the shootings was discounted and ignored by police. (The eyewitness, if believed, would clear defendant.)" CT 778.
> October 27, 1992: Officer Donald W. Wallar of the Vacaville Police Department speaks to Lynn Ann Ruiz. Office Wallar claims that Ruiz said that Fry told her, on October 26, 1992, that he was upset with Cynthia Bell and that he had said that he was going to blow her head off. "M[s.] Ruiz' taped statement made the day after next does not support [O]fficer Wallar's version of her statement.)"
> October 28, 1992: "[P]olice executed [] a search warrant [at] the home of defendant Fry. Fry [is] also subjected to a lengthy interrogation. But since neither the interrogation [n]or the search reveal[] anything...incriminating...John Fry [is] released." (CT 779.) Shannon Nissen is interviewed. He denies having any incriminating information concerning Fry. (CT 780.)
> October 29, 1992: The Bells roommate, Randy Raddosevich, is arrested. Detectives Michael A. Wood and William Rodda of the Vacaville Police Department interrogate Raddosevich. The detectives make "it clear that they [are] looking for dirt on John Fry." Wood threatens Raddosevich: "'The only way you're going to walk out of here, Randy, is if whatever you got to tell me is on the same wave length.' (Taped statement of Randy Raddosevich with Detective[s] Wood and Rodda on 10/29/92.) Mr. Raddosevich had nothing negative to say about John Fry and was not released from jail." (CT 779).
> October 30, 1992: "[P]olice pick up David Sparks, who was with John Fry...on October 26, 1992. Sparks t[ells] police that he was about ready to take off since he thought that the evidence was pointing to him. Yet police assure []Sparks not only that they [are] not interested in [him] but inform [] Sparks that John Fry [is] the murderer. They further inform[] Sparks (falsely) that defendant was the one trying to blamed [sic] the murders on Sparks." (CT 779.)
> November 2, 1992: Police go to Fry's home without a warrant. There, they encounter Shannon Nissen, who had been staying at the home. He is "under the influence of illegal drugs." The police threaten Nissen "with arrest for the drug charges and on the homicide charges but not [sic] charges [are] filed against Nissent [sic] when he agree[s] to give a statement against defendant Fry." (CT 780.)
> November 4, 1992: Nissen gives the police a "statement

> implicating Fry in the homicides.... Nissen, who [would] previously [have been] homeless except for the generosity of defendant Fry, [is] then put up in hotels by the police and his meals and other matters [are] taken care of ...." (CT 780-781.) The police go to "Edgar Fry's home. Edgar [is] very intoxicated.... Police threaten[] to arrest Edgar as an accessory to the homicides if he [does] not give a statement implicating his brother in the homicides. Police let Edgar know what they want[] him to say and Edgar say[s] what they want[]." (CT 781.)
> November 5, 1992: Police contact Debbie Mathies. After "Debbie at first denie[s] that she kn[ows] anything, police officers threaten[] to take her to jail and take away her kids if she [does not] tell them what they 'already' [know]. Many threats are on the police tape of the conversation." (CT 781.)
> Additional/Subsequent Coercion: Police suggest to Edgar Fry "that he not change any of his statements and that he not speak to the defense attorney...." Shannon Nissen tells people that the "police originally convinced him to make a statement against Fry by telling Nissen that Fry was going to kill Nissen and Nissen's friends." (781.)

AP, pp. 47-48.

The First District Court of Appeal set forth the following analysis with respect to the claim that coerced testimony had been improperly admitted:

> Appellant argues the trial court erred by permitting the testimony of prosecution witnesses Edgar Fry, Debbie Mathies and Shannon Nissen to be admitted because it was allegedly "coerced" by the law enforcement authorities. In support, appellant points to evidence that each of these witnesses originally told the police that appellant was not involved in the murders, and did not begin to cooperate "until their own personal interests required them to implicate him."
> This argument fails. When appellant first raised it at trial, the trial court reviewed all the transcripts provided by defense counsel of the witnesses' prior testimony at appellant's earlier trials. The trial court noted that although the police informed the witnesses they could be charged as accessories in connection with this case, there was also evidence the police pressed them only to "tell the truth." The trial court concluded that although there were certainly evidentiary questions going to the credibility of these witnesses, there simply was insufficient evidence they had been coerced to bar their testimony from admission altogether.
> A defendant has only a limited right to exclude the testimony of third parties on the ground that it was coerced. In any motion to exclude the testimony of a third party witness on grounds of coercion, the defendant bears the burden of proving that (a) the witness was improperly coerced; and (b) the reliability of the

> witness's testimony was actually impaired by the coercion. (People v. Badgett (1995) 10 Cal. 4th 330, 346-350; People v. Douglas (1990) 50 Cal. 3d 468, 500.) Although the claim that a witness's statement to the police was involuntary is subject to independent review on appeal, when faced with conflicting testimony in the record a reviewing court must accept the version of the event most favorable to the People. (Badgett, supra, 10 Cal. 4th at pp. 350-352; People v. Howard (1988) 44 Cal. 3d 375, 394.) The record in this case fully supports the trial court's determination. The jury heard both the initial versions of the facts given to the police by Nissen, Mathies and Edgar Fry, and their subsequent statements inculpating appellant. All three witnesses acknowledged they knew of their exposure to charges relating to drugs or complicity in the facts of this case, but specifically denied being subject to police threats, pressure or coercion to say anything other than the truth. There is nothing inherently coercive about confronting a suspect with the legal predicament he or she is in, or with an offer to release from custody or refrain from prosecuting the suspect in return for his or her cooperation with a police investigation. (Badgett, supra, 10 Cal. 4th p. 355; Douglas, supra, 50 Cal. 3d at p. 502, fn. 7.) Nothing more coercive than that occurred in this case. Ultimately, the question was one of credibility. The jury had before it all of the relevant evidence, and was in the best position to judge the credibility of these witnesses. There was no error.

Exh. D to Ans., pp. 66-67.

Because there is no Supreme Court case which speaks directly to the issue presented, petitioner relies on Chia v. Cambra, 281 F.3d 1032, 1037 (9th Cir. 2002), wherein the court stated: "Ninth Circuit case law may be persuasive authority for deciding whether a state court decision unreasonably applied Supreme Court precedent...."

It is true that the opinions of inferior federal courts "may be persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and also may help determine what law is "clearly established." Duhaime v. Ducharme, 200 F. 3d 597, 600-01 (9th Cir. 2000). See also Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

> This does not mean that Ninth Circuit case law is never relevant to a habeas case after AEDPA. Our cases may be persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and also may help us determine what law is "clearly

> established." See MacFarlane v. Walter, 179 F.3d 1131, 1139 (9th Cir.1999) (looking to Ninth Circuit caselaw to confirm that Supreme Court case clearly establishes a legal rule); citing O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir.1998) (holding that "to the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue").

Duhaime v. Ducharme, 200 F.3d 597, 600-601 (9th Cir. 2000). Notwithstanding, the Ninth Circuit has recently cast doubt on the efficacy or significance of this sort of persuasive authority, finding that a petitioner's "reliance on Ninth Circuit or other circuit authority is misplaced." He must show that the California Court of Appeal decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court*." Arredondo v. Ortiz, No. CV-01-00788-ABC, 2004 WL 834782, at * 2 (9th Cir. Apr. 20, 2004) [emphasis in original].

Citing only out-of-circuit authority, petitioner contends that "a criminal defendant may challenge the voluntariness of a witness statement offered by the government 'not based on any violation of [the witness'] constitutional rights, but rather as a violation of [his or] her own Fourteenth Amendment right to due process.'" AP, p. 48, citing, inter alia Clanton v. Cooper, 129 F.3d 1147, 1158 (10th Cir. 1997); United States v. Merkt, 794 F.2d 950, 961 (5th Cir. 198); United States v. Chiavola, 744 F.2d 1271, 1273 (7th Cir. 1984); United States ex rel. Cunningham v. DeRobertis, 719 F.2d 892, 895-896 (7th Cir. 1983); United States v. Fredericks, 586 F.2d 470, 481 (5th Cir. 1978). See also Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's confession at another's trial violates his rights under the due process clause").

Petitioner predicates his specific Fourteenth Amendment claim as to the allegedly coerced testimony exclusively on "the principles set forth in La France v. Bohlinger, 499 F.2d 29 (1st Cir. 1974)." AP, p. 49. In La France, the defense objected to the introduction of a statement signed by a witness attesting to the defendant's guilt in a hit-and-run incident, when the same

witness testified in support of defendant's alibi at trial. Id. The witness testified that at the time he made the statement that he had been threatened by police and "that the statement was, in effect, a police fabrication signed because he was strung out on drugs, frightened, and willing to say anything to get back to his cell....and persisted in maintaining that it was false." La France, 499 F.2d at 31.

The First Circuit found that the trial court or a separate jury should have first determined the voluntariness of the statement to police before allowing the trial jury to determine its credibility, relying on Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964) and Lego v. Twomey, 404 U.S. 477, 485-486, 92 S.Ct. 619, 624-625 (1972). [See also Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246 (1991) (finding coercion in a confession where the state conduct instilled a fear for safety in the defendant)]. In Lego, the Supreme Court noted that whether or not a coerced defendant's confession was reliable or true in Jackson was not the central issue, rather, the high court "feared that the reliability and truthfulness of even coerced confessions could impermissibly influence a jury's judgment as to voluntariness." Lego v. Twomey, 404 U.S. at 485, 92 S. Ct. at 624. What was at issue was whether or not the confession, true or false, was coerced, because use of such a confession "offends constitutional principles" due to the "method used to extract them." Id. As the La France court frames the issue, "[a]t stake is not 'improving the reliability of jury verdicts'... but screening out evidence which, if found to be induced by coercion, is unacceptable regardless of its truth or untruth." La France, 499 F.2d at 33. Thus, the case was remanded to state court for that court to independently determine whether the statement at issue was coerced, the government having the burden to prove an absence of coercion by a preponderance of the evidence; should the court, after hearing the evidence determine the statement not to have been coerced, the judgment would stand. La France, 499 F.2d at 36.

However, once again, petitioner is up a Due Process creek without a Supreme Court paddle. It is tempting to find, as have many pre-AEDPA circuits, that the established

prohibition against coercing a *defendant's* confession can be extrapolated to witnesses as well. If the undersigned were writing on a clean slate, he might so find. But the fact is that the United States Supreme Court has had two occasions to take up the matter and has declined to address the issue both times over vigorous dissents. Bradford v. Michigan, 394 U.S. 1022, 1023-24, 89 S. Ct. 1638, 1639-40 (1969) dissent from denial of certiorari (Warren, Douglas and Marshall, JJ, quoting the dissent of Justice Rutledge in Malinski v. New York, 324 U.S. 401, 430-31, 65 S.Ct. 781, 795 (1945) ("'due process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion. A conviction supported only by such a confession could be but a variation for trial by ordeal.'") Moreover, the establishment, or expansion, of an exclusionary rule is not a slight matter. In the AEDPA context, new exclusionary rules should be left to the Supreme Court and not the inferior courts.[15]

If left to his own devices, the undersigned would order an evidentiary hearing to ferret out actionable coercive conduct, if any. However, AEDPA does not permit the claim to be recognized regardless of the facts. Mention must also be made that even if an evidentiary hearing found actionable coercion, prejudice on this record is not a given. In this case, none of the witnesses repudiated their earlier statements implicating petitioner, but as the court has seen in its review of the extensive trial testimony, petitioner's trial counsel read into the record before the jury portions of police interviews and prior testimony from the witnesses not entirely consistent with the testimony they offered at the third trial, emphasizing earlier concessions by the witnesses that they felt pressured by police. Nevertheless, the strength of any coercion on the witnesses becomes much more doubtful—the third time around. How much could testimony in

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[15]As a postscript to the denial of certiorari in Bradford, the district court in Michigan granted a habeas petition based on the coerced testimony of a witness which was then upheld by the Sixth Circuit. Bradford v. Johnson, 354 F. Supp. 1331 (E.D. Mich. 1972) *aff'd.* 476 F.2d 66 (6th Cir. 1973) (on the grounds set forth in the district court opinion). However, this decision did not depend on the existence of extant Supreme Court authority.

the *third* trial have been the product of coercion taking place prior to the first trial. However, the court need not finally address prejudice in the absence of a cognizable claim.

This claim should be denied.

C. Petitioner's Sixth Amendment Right to Confront the Witnesses Against Him Was Violated When Petitioner's Right to Cross-examine the Key Witness Against Him, His Brother, Was Impermissibly Restricted (Including Alleged Threats Made to the Brother)

In his third claim, petitioner contends that the trial court abridged petitioner's Sixth and Fourteenth Amendment rights by unduly restricting petitioner's cross-examination of Edgar Fry, petitioner's brother, a key prosecution witness. AP, p. 51, Traverse, p. 4.

The state's First District Court of Appeals analyzed this claim as follows:

> [A]ppellant maintains the trial court improperly restricted his cross-examination of prosecution witness Edgar Fry, thereby allegedly denying appellant's constitutional rights to confront and cross-examine the witnesses against him. As in the case of his other arguments, appellant is wrong.
>
> Appellant asserts the trial court prohibited him from "fully exploring" four "areas related to Edgar's credibility": (1) the threats allegedly made to him by the police; (2) problems in Edgar's relationship with appellant; (3) questions about Edgar's state of mind at the time of the murders, including his alleged depression, drinking and drug abuse problems; and (4) questions about whether Edgar obtained the factual information to which he testified from his own personal knowledge or from the police. According to appellant, the trial court improperly "restricted defense questioning in each of these areas, over defense objection; on the grounds "there had already been adequate testimony in those areas." Yet appellant does not provide any specific examples of questions he asserts were proper, but which were improperly disallowed by the trial court.
>
> Under the Sixth Amendment of the United States Constitution, a defendant has the constitutional right to confront the witnesses against him and to cross-examine his or her accusers. Nevertheless, a trial court retains broad discretion over the conduct of trial. Included within this discretion is the power to impose reasonable limits on cross-examination, in order to preclude repetitive, confusing, and unduly harassing interrogation. Thus, the Confrontation Clause simply guarantees an opportunity for effective cross-examination; it does not guarantee an opportunity to cross-examine in whatever way, and to whatever extent, the

> defense might wish. (Delaware v. Van Arsdall (1986) 475 U.S. 673, 679-680; Davis v. Alaska (1974) 415 U.S. 308, 315-316.) As long as the cross-examiner has the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the jury fairly to appraise it, the trial court may permissibly limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues. (Davis v. Alaska, supra, 415 U.S. at p.318; Evans v. Lewis (9th Cir. 1988) 855 F.2d 63 1, 634 ; Steele v. Perez (7th Cir. 1987) 827 F.2d 190, 193-194.)
>
> Appellant's failure to cite any examples of questions he contends the trial court should have permitted him to ask Edgar Fry is fatal to his present argument. Contrary to appellant's vague assertion of improper restrictions on his cross-examination of Edgar, the record actually shows defense counsel was given ample opportunity to inquire into all of the subjects he cites in his brief on appeal. Thus, the trial court permitted defense counsel to question Edgar on his state of mind and usage of drugs and alcohol around the time of the murders. Under cross-examination, Edgar conceded he was depressed about his separation from his wife, and had been using drugs and alcohol. Defense counsel also questioned Edgar at great length about the supposed threats made to him by the police. Similarly, defense counsel cross-examined Edgar concerning his relationship with his brother with repeated questioning about whether they had a "good" relationship, how much time Edgar spent at appellant's house, whether the two "clicked," whether Edgar told police he did not "give a 'F' about" appellant, and whether Edgar ever called appellant "a kick in the dirt as far as I'm concerned." Finally, defense counsel was permitted to question Edgar at length about whether the information to which he testified "originated" with the police as opposed to his own personal experience and observation.
>
> On this record, appellant has utterly failed to establish that any unconstitutional restrictions were placed on his cross-examination of Edgar. To the contrary, the record demonstrates that, as to every subject now cited by appellant as an example of one on which his cross-examination of Edgar was unduly restricted, he actually asked many probing questions and was barely restricted in his cross-examination at all.

Exh. D to Ans., pp. 67-69.

In his petition before this court, petitioner divides into three specific areas the inquiry from which he alleges he was foreclosed:

> (1) Edgar's assessment concerning the degree to which his judgment was impaired when he was being interrogated by the police (RT 2140-2141), (2) the nature and closeness (or lack

> thereof) in the relationship between the Fry brothers (RT 2158, 2307), and (3) certain aspects of the influence on Edgar occasioned by suggestive police questioning and police threats. (RT 2148-2149, 2154-2155, 2225, 2301-2303).

AP, p. 58.

Petitioner quotes at length the on-the-record statement petitioner's trial counsel made to the court (outside the presence of jury) during her cross-examination of Edgar Fry. AP, pp. 51-52, citing RT 2243-2245. In addition, defense counsel submitted points and authorities on the admissibility of evidence of threats. AP, p. 51, n. 68, citing CT 844-846.

Having noted that the state appellate court faulted appellate counsel on direct appeal for failing to cite specific examples of questions that should have been allowed (AP, p. 55), petitioner sets forth examples of the trial court's limitation of the cross-examination. Petitioner commences with a first category speaking to the witness' "sobriety, state of mind and judgment" during the initial police interrogation of Edgar Fry on November 4, 1992, in which Edgar "testified" that he was under the influence of marijuana, heavily under the influence of alcohol, "'emotionally down'" and not in a happy period of his life. AP, p. 52, citing RT 2139-2141.

> Q: [S]o at the time you talked to the police officers, you were not in the state to exercise the best of judgment; isn't that true?
> [Prosecutor]: Objection, vague. Calls for speculation.
> The Court: Sustained.

RT 2140.

> Q: Isn't it true that you were in such a state at the time you talked to the police officers of intoxication that you could not exercise the best of judgment?
> [Prosecutor]: Objection, the question has been asked, and the objection sustained.
> The Court Yes. I'll sustain the objection to that. You can ask him what he did, and then we can make a determination as to whether or not he was able to do what he did.

RT 2141.

As to the second category, concerning the nature of the witness' relationship to his brother, petitioner includes the following exchanges:

Q:	Isn't it true that you never talked to your, uh— to John Fry[,], brother to brother[,] in your whole life?
[Prosecutor]:	Objection, relevance.
The Court:	Sustained.
[Prosecutor]:	Vague.
[Defense]:	I would like to put this one on the record, Your Honor.
The Court:	It's on the record. It was sustained.
[Defense]:	Isn't it true that you've had a lot of disagreement with your brother?
[Prosecutor]:	Objection, relevance. Vague.
[Defense]:	Your Honor, he said that his relationship was pretty good. I have a right to challenge that.
The Court:	Well, I think I'll sustain the objection to the form of the question. I mean, he could have had an argument when he's four years old. I don't know if that's relevant to the trial. ....

AP, p. 53, RT 2158.

Q:	Isn't it true, Mr. Fry, that you even wished the police good luck in prosecuting your brother?
[Prosecutor]:	Objection, relevance, hearsay.
The Court:	I'll sustain it. That doesn't go to bias. Sustained.

AP, pp. 53-54, RT 2307.

In the third category, alleged police threats against as well as police "spoon-feeding" of, Edgar Fry, petitioner sets forth the following:

Q:	[P]rior to the first [trial]... didn't ... Officer Wood and another officer come to your house and threaten you not to change your testimony?
A:	They told me that if I didn't stick with the truth that they could throw me in jail for contempt, yeah.
Q:	Well, they didn't always use the word "truth," did they?

.....

A. Yeah, they did.

.....

Q: [Looking to] your police statement of January 6th, 1993... [t]he officer didn't use the word, "truth," did he?

[Prosecutor]: Objection, hearsay.

[Defense]: Your Honor, it's for impeachment. He said that they did each time.

The Court: I'm going to sustain the objection.

AP, p. 54, RT 2148-2149, 2154-2155.

Q: And it was pretty clear to you when you were talking to the police officers on January 8th that they— that's what they wanted to hear about the statement of what a .357 could do to a skull; isn't that true?

[Prosecutor]: Objection, calls for speculation.

The Court: Sustained.

[Defense]: Talking about his state of mind.

[Prosecutor]: She's asking about the officer's state of mind.

[Defense]: No, I'm asking---

The Court]: I sustained the objection.

AP, pp. 54-55, RT 2225.

Q: Now, you said you were given immunity, but you were told you had to tell the truth; is that correct?

A. Yes.

Q: But the person who was deciding that truth was supposedly the District Attorney; isn't that true?

[Prosecutor]: Objection.

The Court: Sustained.

[Prosecutor]: Objection, Your Honor.

The Court: Not relevant, sustained.

.....

Q: [D]uring that immunity agreement, wasn't there also— didn't the ... Assistant District Attorney also tell you that if you wanted immunity, you couldn't sit there and jack the prosecution around?

[Prosecutor]: Objection, asked and answered.

The Court: Sustained.

[Defense]: Your Honor, I haven't asked this before.

The Court: Well, we've talked about that enough.
[Defense]: The DA---
The Court: I'm going to sustain the objection.

AP, p. 55, RT 2301-2303.

Half-buried within respondent's argument, respondent notes that only in his habeas petition does petitioner provide the specific examples of disallowed questions, which the state appellate court deemed "fatal" to petitioner's (as appellant) argument. Citing Anderson v. Harless, 459 U.S.at 6[, 103 S. Ct. at 277] and Vasquez v. Hillery, 474 U.S. at 260[, 106 S. Ct. at 622], respondent makes only a single and passing reference to petitioner's having failed "to fairly present the factual basis of the claim to the state courts." Ans., pp. 16-17. Respondent's failure to develop any non-exhaustion argument and the half-hearted manner in which it is raised are such that petitioner is not even given sufficient notice to address it. While any such argument with respect to this claim is not explicitly waived by respondent (28 U.S.C. § 2254(b)(3)), respondent only pressed the contention that it is petitioner's failure to have sought an evidentiary hearing on the coerced testimony claim (claim 2) that rendered the amended petition unexhausted, which contention the court has addressed. Moreover, the cases cited do not militate for a finding of non-exhaustion in the context of this claim.

As to the merits, respondent's reasoning tracks the state appellate court's analysis; respondent also specifically contends that at the beginning of cross-examination, defense counsel was allowed to get testimony in as to Edgar Fry's state of mind and drug and alcohol use during the period when he was approached by police, with the concession that he was drinking heavily and separated from his wife, as well as the concession that "'it wasn't the happiest time of my life,'" and an admission to marijuana use. Ans., p. 17, RT 2138-2140. The undersigned notes that the record also indicates that the court itself sought to clarify that Edgar Fry stated that he had been drinking heavily and had used marijuana at the time of the November 4, 1992 police interview:

> The Court: All right. And you're saying at the time of that interview, Mr. Fry, you had consumed alcohol to such an extent that you were under the influence of alcohol?
> The Witness: Yeah.
> The Court: All right. And in addition to using alcohol on the date and at the time of this first interview at your parents' house on November 4th 1992, you had also consumed marijuana along with the alcohol?
> The Witness: Yeah.

RT 2241:7-16.

Respondent asserts that petitioner asked a number of questions about the relationship of the brothers, whether it was "'good,'" whether the witness often visited petitioner's house, whether the two "'clicked,'" whether he had called petitioner "'a kick in the dirt.'" Ans., p. 17, RT 2157-2160.

The witness was also asked by the defense about whether information "'originated'" with the police with his prior answers read back to him. AP, p. 17, RT 2222-2223, 2288, 2297.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The "'exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" Davis v. Alaska, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 1110 (1974) (Sixth Amendment right to confront witnesses required that defendant be allowed to challenge a witness with evidence of a possible motive for his alleged misidentification). See also Redmond v. Kingston, 240 F. 3d 590, 591-92 (7th Cir. 2001) (where defendant was accused of statutory rape, exclusion of victim's prior false allegation of rape violated confrontation clause because it excluded evidence that victim had "a motive for what would otherwise be an unusual fabrication").

A "defendant's right to present evidence is not absolute; he must comply with established rules of evidence and procedure." Carriger v. Lewis, 971 F. 2d 329, 333 (9th Cir. 1992). A criminal defendant "does not have an unfettered right to offer [evidence] that is

incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana v. Egeloff, 518 U.S. 37, 42, 116 S. Ct. 2013, 2017 (1996) (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653 (1988)). Hearsay rules, for instance, "prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable." (Id.) Further, the Confrontation Clause does not prevent trial judges from imposing limits on cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986) ("the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985) (per curiam) (emphasis in original)). In fact, "a trial judge retains 'wide latitude' to limit defense counsel's questioning of a witness without violating a defendant's Sixth Amendment rights." Carriger, 971 F. 2d at 333; Michigan v. Lucas, 500 U.S. 145, 149, 111 S. Ct. 1743, 1746 (1991).

After reviewing the record, the undersigned concludes that petitioner's trial was not rendered fundamentally unfair[16] because of the trial court's evidentiary rulings on petitioner's trial counsel's efforts to cross-examine his brother, the witness Edgar Fry. While the record shows that the trial judge did, indeed, curtail some of defense counsel's lines of inquiry, and, in fact, was on the face of it simply wrong, in ruling, for example, that the witness' apparent good wishes to the police in the prosecution of his brother did not go to bias, that is not the applicable standard under AEDPA. It is also true that the trial judge simply sustained an objection for which no legal basis was offered. Traverse, pp. 42-43. The record of the cross-examination demonstrates that petitioner was able to impeach and undermine the credibility of the witness with transcripts from earlier testimony and police interviews on a variety of issues. A trial judge being wrong on several occasions in sustaining objections to a defense counsel's cross-

[16]Because the alleged lack of confrontation resulted from evidentiary rulings to specific questions, the court utilizes an Estelle fundamental fairness analysis. If no confrontation whatsoever had been allowed, e.g., in a child rape case where a child is not exposed to direct cross-examination, the analysis might have taken on a different form.

examination cannot be construed, in these circumstances, as depriving petitioner of adequate cross-examination.

Another way of looking at the same issue is even assuming that the trial court's curtailment of the cross-examination was an unconstitutional restriction, as petitioner observes, such a restriction would be subject to a harmless error analysis. Traverse, p. 58, fn. 74.

> A Confrontation Clause violation is subject to harmless error analysis. See Delaware v. Van Arsdall, 475 U.S. 673, 681-84, 106 S.Ct. 1431[] (1986); United States v. Bowman, 215 F.3d 951, 961 (9th Cir.2000). Under Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 [] (1993), habeas relief is proper only if any error by the state courts "had [a] substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637, 113 S.Ct. 1710.

Hernandez v. Small, 282 F.3d 1132, 1144 (9th Cir. 2002).

The trial record reveals that petitioner's trial counsel engaged in a comprehensive, substantive and lengthy cross-examination of witness Edgar Fry. The witness admitted to being intoxicated by both alcohol and marijuana at the November 4, 1992 interview, from which a reasonable juror could, even would, infer impaired judgment even if not expressly admitted. Moreover, it is unlikely that this point could have been developed further to much effect, the witness having conceded the point.

Moreover, as noted, defense counsel was able to demonstrate, despite the witness' denials on the stand, that in discussions with police, he had denigrated his brother. Petitioner's not being permitted to fully develop any remoteness and/or alienation from or animosity and/or bias witness Edgar Fry may have felt against his brother, while somewhat troubling, actually conceals very little from the jury, as, after all, the witness was forced to concede that he had called his brother a "kick in the dirt" on the record.

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Defense counsel's questioning forced petitioner to concede that he had said under oath that he had been threatened by police.[17] Petitioner was also given ample room to probe whether or not police "fed" the witness. As an example, in the section cited by petitioner of improperly curtailed cross-examination about who originated the comment about "what a .357 could do to a skull," defense counsel was able to point out that the statement was not made by the witness until January 8, 1993, some two months after he had been speaking with the police, that just before the police asked him whether or not petitioner had made such a statement, the witness stated that he could not remember what petitioner had said other than intimating that he had killed the victims. RT 2222-2225.

The finding of the state appellate court, that petitioner's trial counsel was provided ample opportunity to probe the witness is substantiated by the record, and to the extent that she was unconstitutionally limited, if at all, this court finds that the petitioner does not demonstrate that the restrictions "had [a] substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637, 113 S. Ct. 1710. The state court's denial of this claim was neither contrary to, or an unreasonable application of, clearly established federal law. This claim should be denied.

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[17] "Q. In March 1994, did you testify about the threats that the police made to you?"
A. Yes.
Q. In January of 1993, did you testify about the threats that the police had made to you?
A. Yes.
Q. And in November of 1994, October, November, did you testify about the threats the police had made to you?
A. Is that another one of the trials?
Q. Yes.
A. Yeah."
RT 2149-2150.

D. Petitioner Was Denied His Right to Present a Defense by Exclusion of Testimony of a Witness Who Overheard a Third Party Confession to the Murders

Petitioner claims to be innocent of the murders of which he has been convicted. AP, p. 2; Traverse, pp. 5-6. As noted, petitioner's first two trials ended in hung juries. AP, p. 2. Jury deliberations in the third trial spanned five weeks, with jurors at one point declaring themselves deadlocked with a 7-5 split. AP, p. 2; CT 664-667[18]; RT 5154.6. An eyewitness, a truck driver, Russell Carter, a neutral party who knew neither the victims nor the defendant, testified that he had been driving by as the shootings occurred, saw the man who perpetrated the murders and that that individual was not petitioner. AP, pp. 2, 4, 13-16; RT 4578, 5154.6; Traverse, p. 6. Petitioner declares that while the jury in the third trial was allowed to hear the Carter testimony, jurors were not allowed to hear the testimony of Pamela Marie Maples concerning the confession of her cousin, Anthony Hurtz, the person petitioner claims to be the actual shooter. AP, p. 4. Hurtz was a drug dealer (AP, pp. 4-5; RT 3994, 4065, 4485), whose killing of the victims was purportedly drug-related. AP, p. 5. Petitioner asserts that Anthony Hurtz repeatedly confessed to different people that he had perpetrated the killings. AP, pp. 22-26; RT 3995-3999, 4138-4145, 4156-4158, 4229-4230; Traverse, pp. 44-52.

Petitioner maintains that exclusion of testimony from a witness that another individual had confessed to the killings at issue in this case resulted in a deprivation of petitioner's "fundamental constitutional right to a fair opportunity to present a defense," Traverse, p. 44, fn. 21, quoting Crane v. Kentucky, 476 U.S. 683, 687, 106 S. Ct. 2142, 2145 (1986).

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi, [410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925 [] (1967); Davis v.

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[18] As already noted (see footnote 5), the court cannot locate pages 660-667 of the clerk's transcript in the record submitted in this matter.

> Alaska, 415 U.S. 308, 94 S.Ct. 1105 [] (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

Crane v. Kentucky, 476 U.S. at 690, 106 S. Ct. at 2146.

Petitioner[19] contends that Anthony Hurtz killed the victims at the behest of an

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[19] "Appellant testified in his own defense. In October 1992, he owned a 1977 '[p]owder blue' Ford pickup truck with a white camper shell. At the time he also owned five guns, including a Ruger .357-magnum. Appellant denied killing either Cynthia or James Bell, threatening to do so, or talking with anyone about having done so.

Appellant testified that he began selling drugs to support his own methamphetamine habit after he was fired from his truck driving job in September 1992. He was not very successful at it, and was 'slowly losing ground.' Appellant met Cynthia Bell because she was a friend of his girlfriend, Ringler. He would 'front' one-sixteenth of an ounce of methamphetamine to Cynthia, who would in turn 'cut' the drug, divide it into smaller parcels, and then pay him back after selling it herself. Although Cynthia was in debt to appellant for as much as $700, appellant claimed she would always pay him back. Just before she was murdered, Cynthia owed him between $150 and $170. Appellant claimed that he never threatened Cynthia about the money she owed him.

Appellant described the incident on October 23, 1992, in which Cynthia Bell 'entered my house without asking, or broke into the house, however you want to say it.' He claimed that he did not get angry at Cynthia; instead, he was 'more amused' by the incident. After Cynthia found him in his bedroom, he 'fronted' her a quantity of methamphetamine, injected her with some of the drug, and then socialized with her and James Bell. He claimed that after that, everything 'was fine' between them.

Appellant had known Murphy from going to school with her between 1966 and 1979. He started selling drugs to her in October 1992. Murphy introduced appellant to Bernal about one week before October 26. Through Bernal, appellant also became reacquainted with Daryl Borelli, whom appellant had known in high school. Bernal served as a conduit for drug purchases by appellant from Borelli. On October 25, Borelli brought two ounces of methamphetamine to appellant's house. They had never dealt personally with each other before. Later that night, Borelli came over to appellant's house again. They talked in appellant's bedroom about the 'games' Bernal was playing, and decided that from then on Bernal would not serve as a 'middleman' for them. According to appellant, Borelli told him that as long as he had Murphy and Cynthia in his business, he 'was going to have problems,' and Cynthia 'shouldn't even be able to breathe the air that we do.' Appellant denied saying anything negative about Cynthia to Borelli or twirling a gun around in his presence.

Appellant acknowledged driving Murphy out into the country on October 24, 1992. He claimed he was merely taking the 'rural route' to Davis. According to appellant, Murphy was 'hysterical,' so he simply let her talk for a while. Then he began to question her about a tape recording he had heard of a suspicious conversation between Murphy and Bernal. Appellant denied threatening to kill Murphy at any time or pointing a gun at her. According to appellant, he simply 'decided to play a little game,' and shot his gun out of the truck window twice. Appellant next saw Murphy on the morning of October 26, when, according to him, she called to ask him to pick her up at a friend's apartment in Davis. When he arrived, he became irritated because no one was there. He kicked the door, and it 'flew open.' He then went in and sat on a couch, thinking 'somebody would show up sooner or later.' When Murphy arrived, appellant left a note apologizing for the damage to the door.

Appellant asked Murphy to contact Ruiz because he wanted to ask her advice about how to get along with heavy methamphetamine users. He denied making any threats against the Bells or anyone else while talking with Ruiz. He 'could have said something' to the effect that he felt 'like just blowing them away,' but he was only 'laughing and joking,' and not directing the comment 'toward any one person.' Appellant decided he 'didn't want to deal in drugs anymore,' because he 'didn't want to put up with the games that were being played,' and was planning on 'cutting everybody loose,' including Cynthia. He did not want to talk to Cynthia or have anything to do with her, although she would continue to be welcome in his house because of her friendship with Ringler. Appellant denied making any arrangements with Cynthia to meet her at the intersection of Interstate 505 and VacaValley, or anywhere else that day.

Sparks arrived at appellant's house with 'another kid' whom appellant did not know between 5:30 and 6:00 p.m. on October 26, 1992, and tried to sell appellant a .357 special. Appellant did not buy it because it was damaged. According to appellant, Sparks said he had some money and was looking for an ounce of methamphetamine. Because he did not want to deal in his house, appellant told Sparks to wait in a nearby park while appellant tried to find some drugs. Appellant and Bernal left in appellant's pickup truck at the same time Sparks left. When Sparks proceeded onto the freeway instead of toward the park, appellant followed close behind and blinked his headlights. They pulled over, and agreed that Sparks would come with appellant to look for methamphetamine while Bernal went with Gibeau and then met them at a gas station in an hour. Once appellant found some methamphetamine, however, Sparks was no longer interested in buying it and instead asked appellant to take him to Vacaville. Appellant declined, saying he would take Sparks to the agreed rendezvous. According to appellant, Sparks 'was so spun, he couldn't talk.' After driving around for awhile looking for someone to purchase Sparks' gun, appellant stopped at the gas station and got out to telephone Ringler, leaving his own .357 gun on or under the seat. When appellant returned to the truck, Sparks was gone. Appellant did not see Sparks leave; he assumed Bernal had picked him up. Appellant did not check to see if his gun was still in the truck.

Appellant testified that after Sparks left, Bernal and Gibeau arrived and talked with him for about 20 minutes before leaving. John Peterskoff and Manuel Michel, two of appellant's former trucking acquaintances, also pulled up at the gas station. After drinking beers and socializing with them for at least an hour, appellant telephoned Ringler at approximately 7:00 p.m. Thereafter, he 'shot up,' and drove home 'very slowly.' When he got home, he 'pulled into the driveway and sat there for a while,' 'trying to maintain control' and 'get a focus.' After Mathies, Nissen and Ringler asked him if he 'was going to come inside or just sit out there all night,' he came inside with his briefcase and his shirt on. Because appellant "was pretty spun" on drugs at that point he 'didn't even think about' his gun, even though it was his normal custom always to retrieve his gun from the truck and bring it into the house with him in the briefcase or some other holder. Appellant went upstairs, put down his briefcase, and went into the bathroom. He denied changing his clothes or having any blood on him. A few minutes later, someone came to the bedroom and informed appellant that Michel was there to see him. Michel stayed for about an hour talking with appellant and taking drugs. Between 10:00 and 10:30 p.m., in response to two telephone calls, appellant went to the nearby Chevron station to supply Pete and Shannon Joy with methamphetamine. After about 20 minutes, appellant came home and went to sleep.

The next morning, appellant asked Nissen to help him take the camper shell off of his pickup truck because he wanted to save gas mileage. He denied telling Nissen he did not want anyone to recognize the truck, or saying anything to Nissen about the victims. Appellant claimed to have asked Nissen to take his gun from his briefcase, and to put it

individual named Darryl Borelli, with whom he met, as established by several defense witnesses, at a Denny's in order to plan the homicides, that Borelli wanted Cynthia Bell killed due to a drug debt and/or "'rip off,'" and that Borelli and Hurtz made a number of incriminating admissions concerning the murders. AP, p. 59.

In their unpublished opinion, the First District Court fairly set forth the facts (RT 4136- 4145), as well as their reasoning, as to this claim:

> Defense witness Pamela Marie Maples testified that Hurtz was her cousin. According to Maples, while at her sister's house in Vallejo in April 1994 she "overheard" Hurtz discussing some homicides. After the trial court sustained the prosecution's objection to the

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behind the seat of the truck. According to appellant, his 'last clear recollection' of the gun was seeing in [sic] on the seat of his truck while he was talking with Sparks. He assumed the gun was in his briefcase because it was his usual habit to put it in the briefcase when he got out of the truck and went into the house. Appellant conceded that his usual custom was to have a trigger lock on the gun, and that it would have to be removed for the gun to be used.

[Footnote 5] On October 28, 1992, the police found a trigger lock in a gym bag on the passenger floorboard of appellant's pickup truck.

Appellant also admitted he lied to the police when asked when he had last seen his .357. Appellant denied asking Turner to get rid of his gun.

[Footnote 6]Appellant testified he did not know Turner, and was introduced to him the first time when Turner came with Ringler to pick him up at the police station. According to appellant, he did not ask Turner to 'get rid' of his gun because 'I didn't even know Mike Turner. I wouldn't ask somebody I didn't know to do something like that.'

Appellant denied telling Carter that he killed the Bells. According to appellant, Carter asked him whether he killed someone in Yolo County and whether he 'did the two in Vacaville.' After 'playing with [Carter's] mind' and 'having fun' with him a bit, appellant told him 'No, but they sure think I did.' Appellant claimed he fled from the police when they tried to arrest him because he "had no intentions on going to prison for three counts of murder that I didn't do."

Appellant denied confessing to Jacobitz or giving him any information about the Bells' murder. According to appellant, Jacobitz was a known 'liar'; appellant was suspicious of him because he asked too many questions about appellant's case and wanted to read all of appellant's newspaper clippings. Appellant let Jacobitz read some newspaper clippings, which Jacobitz kept for several days. However, appellant would not let Jacobitz read the police report because he mistrusted him. Appellant thought Jacobitz may have heard him talk with other inmates about how witnesses had testified at his earlier trials. Appellant testified that while in the county jail law library, Jacobitz offered to help him by having Edgar killed. Appellant rejected the offer, saying he just wanted Edgar 'to tell the truth,' i.e., that Edgar 'had been threatened' by the police to give testimony against appellant. On cross-examination, appellant admitted that he gave Edgar's address to Jacobitz. According to appellant, he "didn't think [there] was any harm" in doing so even though Jacobitz claimed to be a member of the Aryan Brotherhood and had offered to have Edgar "done in," because Jacobitz was 'a liar.'" Exh. D to Ans., pp. 20-25.

admission of Maples' testimony as to what she heard Hurtz say, the defense made an offer of proof that Maples overheard him say he had killed a man and a woman in a car in Vacaville, and was covered with blood as a result.

Under questioning outside the presence of the jury, Maples testified that she was present with her sister, Hurtz, and "a guy named Steve" at a conversation in which Hurtz allegedly said he had killed a man and a woman in a car. Maples was "in and out of the room" at the time, only heard "bits and pieces" of the conversation, and never joined in it. The conversation was already underway when she came in; she did not know how long they had been discussing the murders, the context of the discussion, or whether it was "serious" or not. Nevertheless, Maples testified that Hurtz said he shot "[t]he girl" "[i]n the head" first, and "[t]then he reached over and shot the guy." Hurtz said they were in a parking place, but did not otherwise describe the locale of the murders or the type of car the victims were in. Afterward, according to Maples' version of what Hurtz said, "he was full of blood" and "ran through a field, threw mud upon himself, and then went to make the phone call for somebody to pick him up." Maples "didn't hear" Hurtz say when the murders took place. Under cross-examination, she acknowledged that she had no idea whether the murders took place one week or 10 years before the conversation, or whether they took place in California or somewhere else.

The trial court sustained the prosecution objection, stating the defense had failed to establish sufficient foundation to permit Maples to testify as to the alleged statements of Hurtz, because there was insufficient evidence to connect the details of the incident allegedly described by Hurtz to the facts of the murders at issue in this case.

Exh. D to Answer, pp. 55-56.

APPLICABLE LAW

A criminal defendant has the right to present evidence of third party culpability if it is capable of raising a reasonable doubt about the defendant's own guilt. (People v. Hall (1996) 41 Cal. 3d 826, 833; People v. Von Villas (1992) 10 Cal. App. 4th 201, 264.) However, a trial court is not required to permit the admission of any evidence, however remote, to show a third party's culpability. "[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (Hall, supra, 41 Cal. 3d at p. 833; see also People v. Clark (1992) 3 Cal. 4th 41, 131: Sandoval, supra, 4 Cal. 4th at p. 176.)

The mere possibility that some third person committed the crime is not enough. In order to place reasonable limits on the trial of

collateral issues and avoid undue prejudice to the People from unsupported jury speculation on the possible guilt of other suspects, there must be some competent and substantial proof of a probability that this actually happened. (People v. Green (1980) 27 Cal. 3d 1, 22, overruled on other grounds in Hall, supra, 41 Cal. 3d at p. 834, fn. 3; People v. Perry (1980) 104 Cal. App. 3d 268, 272; People v. Whitney (1978) 76 Cal. App. 3d 863, 869-870.) Even if a defendant's evidence is found to raise a reasonable doubt, the evidence may still be excluded in the discretion of the trial court if its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion of the issues. (§ 352; Hall, supra, 41 Cal.3d at pp. 829, 834, Von Villas, supra, 10 Cal. App. 4th at p. 265.) An appellate court should not disturb the trial court's exercise of its wide discretion in making this determination unless there has been a manifest abuse of discretion resulting in a miscarriage of justice. (People v. Milner (1988) 45 Cal. 3d 227, 239; People v. Harlan (1990) 222 Cal. App. 3d 439, 446.)

DISCUSSION: NO ABUSE OF DISCRETION

The trial court did not abuse its discretion in excluding Maples' testimony in this case. Even if her testimony was fully credited, there was simply insufficient evidence to connect the murders she heard Hurtz describe, with the ones at issue here. Although Hurtz allegedly said he shot a man and a woman sitting in a car in a "parking place," Maples did not know when or where the killing occurred, or even if Hurtz was seriously describing an act he had himself committed. There was no mention of Cynthia or James Bell, and indeed no identification of the alleged victims' of Hurtz's murders at all.

Given the absence of any actual linkage to the charged offenses, or any other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell, Maples' testimony simply did not tend to show appellant's innocence. In view of the total lack of identifying information linking the alleged uncharged offense and the charged crimes, the evidence was insufficient to raise a reasonable doubt. The trial court's ruling was an appropriate exercise of its discretion under section 352. (Davis, supra, 10 Cal. 4th at p. 502; Pride, supra, 3 Cal. 4th at p. 238; Clark supra, 3 Cal. 4th at pp. 132-133; Von Villas, supra, 10 Cal. App. 4th at pp. 266-267.)

> [Footnote 17] At any rate, no possible prejudice could have occurred to appellant as a result of the exclusion of Maple's testimony. As seen, the trial court had already permitted appellant to introduce the very similar testimony of both Harmina Ross and Eliane West regarding Hurtz's alleged confessions of shooting two unidentified people at close range while the victims were sitting in a

> parked car near Vacaville. Maple's testimony to similar effect was merely cumulative.

Exh. D to Answer, pp. 56-57.

Petitioner argues that the exclusion by the trial court of Maples' testimony violated petitioner's right to due process and right to present a defense. He contends that only she could not be impeached or shown to be biased as had other third party culpability witnesses. AP, pp. 66-67. While the Supreme Court recognizes a right to present a complete defense, that right is restricted "to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973). Where the preferred evidence of third-party culpability simply affords a possible ground of suspicion against a third party and does not directly connect that person with the actual commission of the offense, the evidence may be excluded. See People of Territory of Guam v. Ignacio, 10 F.3d 608, 615 (9th Cir. 1993) (quoting Perry v. Rushen, 713 F.2d 1447, 1449 (9th Cir. 1983)).

To evaluate whether exclusion of evidence reaches constitutional proportions, the court must balance five factors: "(1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense." Tinsley v. Borg, 895 F.2d 520, 530 (9th Cir. 1990). A criminal defendant must demonstrate that his interest in presenting evidence in his favor outweighs the state's interest in reliable and efficient trials before a court should interfere with routine evidentiary matters. Perry v. Rushen, 713 F.2d 1447 (9th Cir. 1983). Only "particularly crucial and reliable evidence" will satisfy this test; "[e]vidence of little importance, whether merely cumulative or of little probative value, will almost never outweigh the state interest in efficient judicial process." Id. at 1453. Applying these factors to the case at bar, this court finds that the

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trial court did commit constitutional error when it excluded the evidence discussed above. [20]

Evidence of her cousin's (Hurtz's) alleged remarks to her sister and another person, overheard in part by Maples, about Hurtz's involvement in the double murders are of the type generally deemed to be inherently reliable, as a declaration against interest, and such remarks would constitute, if believed, substantial evidence that another person or persons committed the crime, which was petitioner's defense. See Chambers v. Mississippi, 410 U.S. at 302, 93 S. Ct. at 1049. Moreover, respondent does not dispute that Maples, as Hurtz' cousin, was the only third party culpability witness who had no apparent bias.

Respondent asserts, however, that the witness' testimony would have been seriously undermined on cross-examination due to the weaknesses inherent within it. There is no doubt that the testimony would have been subject to rigorous cross-examination and the uncertainties highlighted, including that Ms. Maples did not know when or where the murders to which Hurtz was alluding occurred, that she only heard "bits and pieces" of the conversation, that she could not even be sure the conversation was serious. RT 4139, 4140, 4141- 4142, 4144. However, there is a much more compelling case for relevance of the testimony than the state trial and appellate courts credited. Although the offer of proof regarding Maples is in parts imprecise, certain significant points match or closely parallel some of the key circumstances of the case at issue. AP, pp. 47-48. Both victims had been shot to death; victim Cynthia Bell had been shot in the head; the victims were in a car, parked in a turnout area; evidence showed she was in the driver's seat and James Bell was in the passenger seat and that the shooter was standing outside the vehicle's driver side; testimony revealed that the shooter would have been covered in blood. Id., citing RT 574, 587, 666-667, 687, 845, 848-849, 1472-1476; 1495-1521. Just how many

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[20] As set forth in subsequent sections, it is difficult to understand whether the claim to be analyzed is a "preclusion of defense" or an Estelle evidentiary error. The court has chosen the tack that when evidence or testimony as a whole has been excluded, the better mode of analysis is the "preclusion of defense" line of authority. In those instances where not the entire testimony has been precluded, but only specific answers to specific questions, the Estelle evidentiary error framework is more appropriate.

double execution style homicides involving a female driver shot in the head and a male passenger also shot in a parked car could there be in a community proximate to the victims' murder herein? When asked where Hurtz was living some two and half years prior, which was around the time of the Bell murders in Vacaville, Maples knew that Hurtz had been living in the vicinity of Sacramento, then Fairfield. Traverse, pp. 47-48; RT 4137, 4140, 4141, 4143. Moreover, petitioner is correct that the state appellate court's reasoning that there was no "other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell," is a statement that is insupportable on the record of this case no matter how narrowly it is construed where seven other witnesses (Chantelle Eittreim (via reading of transcript of prior testimony), Candida Eittreim, David Eitrreim, Kenneth Keith, Harmina Ross, Eliane Patricia Ross, George W. McCleese, Jr.) specifically link Hurtz to the deaths of the Bells. AP, pp. 64-68 & fn. 91; RT 3993, 3995-3999, 4008, 4038, 4069-4070, 4088-4089, 4099, 4104-4106, 4156-4158, 4167-4175, 4230, 4247, 4249, 4435, 4439-4440, 4442-4445, 4484-4485, 4487, 4502-4503. Most of these witnesses were either Hurtz's former girlfriends or family members of the former girlfriends. Although not all seem to have been asked, none of these witnesses appear to have testified, with the exception of Kenneth Keith, that they even knew petitioner. RT 3993-3994, 4154, 4228, 4484, 4752.

In short, the evidence of third-party culpability ....was sufficiently "crucial or reliable" to outweigh the state's interest in exclusion of untrustworthy evidence. The proffered evidence was not on its face so collateral to the issue of third party culpability that its exclusion did not violate the Sixth and Fourteenth amendments. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (evidence that another person had confessed to the crime improperly excluded); Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920 (1967) (testimony of convicted co-defendant which would have necessarily exonerated the defendant improperly excluded); United States v. Armstrong, 621 F. 2d 951 (9th Cir. 1980) (exclusion of evidence that another man, matching description of the robber, had used bait money from the robbery to purchase a car improperly

excluded)). The jury should have been permitted to evaluate the testimony, which would have been subjected to probably rigorous cross-examination. For the state appellate court not to recognize the trial court's error was an unreasonable application of clearly established law as set forth by the Supreme Court.

However, the question that remains is whether or not, under Brecht vAbrahamson, 507 U.S. 619, 113 S. Ct. 1710 (1993), the error was harmless. Under Brecht, it must be determined whether or not the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 507 U.S. at 623, 113 S. Ct. at 1714. In a case where the trial ended in a hung jury twice before and in this case where the jury was nearly deadlocked before ultimately reaching a verdict after five weeks, petitioner would have it that any error imposed a "substantial and injurious effect" on the verdict. However, petitioner himself noted that the testimony at issue was not set before the earlier juries which ended in mistrial because Maples had not been located; those two trials, nonetheless, each ended in a mistrial, without the evidence that was improperly excluded in the third trial. The court cannot help but emphasize that the previous mistrials occurred in the absence of Maples' testimony. Respondent is correct that petitioner presented a number of defense witnesses attesting to Hurtz's and Borelli's culpability. The same corroborative value attributable to Maples' testimony that is a part of the constitutional error analysis in petitioner's favor, nevertheless cuts against petitioner when determining whether the exclusion of Maples' testimony was harmful. The defense witnesses' implicating Hurtz, who were heard by the jury, were more exact and precise in their testimony and alleged far more damning detail, notwithstanding any bias and/or impeachment the prosecution was able to show. Thus, the jury did hear a good bit of evidence regarding Hurtz' alleged involvement. Moreover, respondent is correct that she could not have emerged completely unscathed by a cross-examination that would have pointed up the infirmities of her putative testimony, as noted above. While this court cannot conclude, as did the state appellate court that "no possible prejudice" could have ensued as result of the exclusion of the testimony,

the court does find that there has been an insufficient showing that the improper exclusion of the testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict. Habeas relief should be denied for this claim.

E. The Trial Court Unduly Restricted Fry's Presentation of Evidence to the Jury Regarding the "Actual Killer's" (Hurtz) Prior Convictions; Hurtz Testified, and the Trial Court's Exclusion of the Evidence Regarding His Past Gave the Jury a False Impression of Hurtz

Petitioner, as respondent notes, with no briefing or discussion whatsoever attempts to incorporate this claim into his amended petition and his traverse, solely by reference to the original pro se petition, which sets forth no statutory or case authority for this putative ground for relief, and to the briefing on direct review before the state courts, which briefing references only state case law with a passing reference to the federal and state constitutions. AP, p. 84; Ans., p. 21, Traverse, p. 53, Petition pro se, p. 5(d), ;Exh. A to Ans., Appellant's Opening Brief, pp. 88-92; Exh. C, Appellant's Reply Brief, pp. 18-21; Exh. E, Petition for Review, pp. 20-21.

A bare contention, unsupported by explanation or authority, is deemed waived. See FDIC v. Garner, 126 F.3d 1138, 1145 (9th Cir. 1997) (claim waived when no case law or argument in support is presented); Seattle School Dist., No. 1 v. B.S., 82 F.3d 1493, 1502 (9th Cir. 1996) (party who presents no explanation in support of claim of error waives issue); see also Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir.1990) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority . . . forfeits the point. We will not do his research for him."); Johnson v. Indopco, 887 F. Supp. 1092, 1096 (N.D. Ill. 1995) (finding argument unsupported by relevant authority, or by demonstration of why it is a good argument despite lack of authority, constitutes mere assertion not meriting court's attention); Arredondo v. Ortiz, No. CV-01-00788-ABC, 2004 WL 834782, at * 2 ("Normally we decline to address an issue that is simply

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mentioned but not argued [citation omitted], and we see no reason to depart from that practice in a habeas appeal.").

This ground for habeas relief, in the form of a bare and unsupported contention, presented as it is without supporting explanation, argument, or authority in this court, has, in essence, been abandoned. Having been so abandoned, the claim is mooted and must necessarily be denied.

F. In Violation of Fry's Fundamental Constitutional Right to Adduce Third Party Evidence, the Trial Court Precluded Fry from Presenting Evidence to the Jury that an Accomplice of Hurtz Had Admitted to Being in Possession of the Murder Weapon

Petitioner contends that he was unconstitutionally deprived of the opportunity to present third party culpability evidence before the jury when the trial court did not allow defense investigator, Robert Morse, to testify that a third party witness, Debra Neundorf, had admitted to being untruthful in her testimony in averring that witness Darryl Borelli, her former boyfriend and the individual on whose behalf petitioner believed Hurtz and possibly others were acting in murdering the Bells, had not told her he had possession of the murder weapon. AP, pp. 84-86. As petitioner emphasizes, his defense has always been that he did not commit the murders. AP, p. 84. Darryl Borelli was "another local methamphetamine dealer to whom Cynthia Bell owed money." Opinion, First District Court of Appeals, Exh. D to Ans., at 27.

Borelli, *called by the defense*, testified that he took no part in the Bell murders, that he had made no statements to anyone about his having disposed of the murder weapon, that he did not have anything to do with the disappearance of petitioner's .357. AP, p. 85, RT 2794-2795, 2800. The state court of appeal summarizes the facts undergirding this claim accurately (with a minor correction noted by this court):

> Appellant next contends the trial court erred in refusing to allow him to impeach the stipulated testimony of his own defense witness Debra Neundorf by means of alleged prior inconsistent

statements and statements against penal interest. Although we believe the trial court erred in its analysis of the question whether Neundorf's alleged out-of-court statements were made against her penal interest, we conclude that any possible error in denying their admission was not prejudicial.

PROCEDURAL BACKGROUND

Debra Neundorf was called as a defense witness at both of appellant's prior trials. The defense was unable to call her in person as a witness at this trial because she was declared unavailable, having invoked her Fifth Amendment rights due to an arrest prior to trial. The parties therefore stipulated that her testimony from the second trial could be read into evidence. Pursuant to this stipulation, Neundorf's direct, cross, redirect and recross examinations from the prior trial were all read into the record. In that testimony, Neundorf testified that although she had previously dated Borelli, she was not dating him in October 1992; she never sold drugs to Cynthia Bell on Borelli's behalf, she never heard Borelli make threats against the Bells; Borelli never told her he was responsible for the Bells' murders or that he had the murder weapon; Borelli had never threatened her to dissuade her from testifying; and she was not afraid of Borelli. Appellant also questioned Neundorf on whether she had told defense investigator McClellan she was dating Borelli in October 1992.[21]

Several days after Neundorf's previous trial testimony was read into the record, defense counsel called one Robert Morse to impeach Neundorf with new testimony that while recently in jail custody, she told Morse she had been untruthful in her prior testimony, she was very afraid of Borelli, and Borelli had told her he had the murder weapon. The prosecutor objected on the grounds Morse's testimony about Neundorf's alleged recent statements was hearsay offered for proof of the facts asserted; Neundorf was unavailable to be cross-examined about her conversation with Morse; and, because the recent statements to Morse were made long after Neundorf's earlier trial testimony, she necessarily could not have been examined at that time so as to give her an opportunity to explain or deny her alleged subsequent statements. The trial court announced it would sustain the objection unless the defense could establish some legal right to present the new testimony.

The following colloquy took place: MR. KEALY

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[21] According to the transcript of the testimony, petitioner's counsel had asked whether Neundorf had told Lou Kalish, a criminal investigator for the Solano County District Attorney's Office, not defense investigator McClellan, that she and Borelli were dating at the time of the homicides (October, 1992). RT 4416, 4428.

[the prosecutor]: She's not available for cross-examination on these. The Court has declared her unavailable as a witness. I don't know whether she's going to come in and say I never talked to Mr. Morse about this. She's never been asked, did you tell Mr. Morse these things.

THE COURT: Okay. I'm going to sustain the objection subject to if you can find me some law. But my feeling is we declared her to be unavailable. Now, she's testified by way of stipulation from her prior trial, and I think you're stuck with that. If you have some law that says otherwise, give it to me. We'll address it . . .

MR. KEALY: Your Honor, if I may, just because counsel has some case-

MS. VOSS [defense counsel]: I don't understand the grounds for sustaining it. It's impeachment. Just because she's unavailable-she wasn't unavailable when this, uh, conversation took place. She said it, and she was cross-examined as to these matters.

MR. KEALY: There's been no testimony cross-examined as to anything she told Mr. Morse. We read her testimony in a couple weeks ago. Apparently, if I'm right, this happened with Mr. Morse within the last week?

THE WITNESS [Morse]: Yes.

MR. KEALY: The last couple of days?

THE WITNESS: Last few days. But she was cross-examined on these matters, and she said something different. This is impeachment.

THE COURT: No, that wouldn't be fair. In other words, you read in the testimony and then you go investigate, get something different. She's not around, and how can the other side, whether it was one way or the other, . . . confront the witness? That's the real problem.

At a further hearing on the matter the next day, defense counsel argued Morse's testimony should be admitted on two grounds: (1) because during her previously transcribed testimony at the earlier trial Neundorf was cross-examined on similar statements concerning Borelli she allegedly made to a different defense

investigator, the defense had already satisfied any confrontation requirements for the admission of her subsequent statements to Morse as prior inconsistent statements; and (2) Neundorf's alleged statements to Morse that she had been untruthful in her trial testimony were separately admissible as declarations against penal interest. The prosecutor responded that Neundorf had only been cross-examined about her earlier alleged statements to defense investigator McClellan, and had not had the opportunity to be confronted with her alleged statements to Morse. The trial court noted that "the real question" was the "fundamental fairness" of permitting one side to stipulate to the previous testimony of a witness, and then contradict that testimony with hearsay statements made after the fact while the witness was unavailable to testify.

The trial court ultimately sustained the objection, concluding that the prior inconsistent statement exception to the hearsay rule "applies only when the person whose statement is being used is a witness and has an opportunity to explain or to deny the statement." The court also noted that the hearsay statements sought to be admitted were made subsequent to her testimony, and were therefore not "prior" inconsistent statements. With respect to the question of whether they were admissible as against Neundorf's penal interest, the trial court found that Neundorf's alleged admission that she was "untruthful" in her previous trial testimony lacked any evidentiary value because it could not be ascertained whether or not the subject as to which she allegedly stated she had not told the truth constituted a "material fact."

> The trial court stated: "Now she [Neundorf] makes a statement, according to Mr. Morse that he overheard, that [`] when I testified I wasn't telling the truth.[`] . . . [¶] I don't know if that would be to a material fact, to every fact, or to no fact, or to the way she spelled her name when she was asked how to spell her last name. And so I don't know what evidentiary value that has."

APPLICABLE LEGAL PRINCIPLES

[Discussion of California law]

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Regardless of the merits of that argument [another argument under California law], we have concluded the trial court erred in its analysis of appellant's alternative contention that Neundorf's statements to Morse should have been admitted under the exception for declarations against penal interest.

The trial court's stated reason for rejecting admission of Neundorf's alleged hearsay statements to Morse on this ground

was that there was insufficient evidence the statements were material. According to the trial court, it was impossible to tell what evidentiary value Neundorf's statements had because it was unclear what she was referring to when she told Morse she did not tell the truth at the prior trial.

Because materiality is an element of the crime of perjury, the prosecution's failure to prove it is fatal to a perjury charge. What is at issue here, however, is not the merits of a perjury claim, but the application of a particular hearsay exception to the admission of proffered out-of-court statements. As in the case of other hearsay exceptions, the essence of the exception for statements against interest is the declarant's state of mind at the time of making the subject statements. Specifically, the rationale of the exception is based on the assumption that reasonable persons would not say deleterious things about themselves if they thought doing so would be harmful to their interests. In this context, then, the question is not whether Neundorf's statements would ultimately be adjudged "material" and perjurious as a matter of law, but whether her statements could possibly expose her to a charge of perjury and therefore be considered contrary to her penal interest.

In this case, Neundorf purportedly admitted that she lied under oath. Even if she may ultimately have been acquitted of a perjury charge, her potential exposure to arrest, pretrial detention and criminal prosecution by itself is clearly contrary to her pecuniary interest, and certainly subjects her to the risk of criminal liability as well. Assuming Neundorf did lie under oath and admit that she had done so, it strains credulity to conclude she did not see herself at risk because she somehow had enough knowledge of criminal law to realize both that materiality was an element of the crime of perjury, and that no court would find her lies "material."

We conclude that a reasonable person in Neundorf's position would have thought of her admission of lying under oath as being against her interests, and her out-of-court statements therefore qualified for admission under that exception to the hearsay rule. Even so, the trial court could still have excluded the statements if it determined they were not sufficiently reliable or trustworthy. (People v. Cudfo, supra, 6 Cal. 4th at pp. 607-609; People v. Frierson (1991) 53 Cal.3d 730, 745.) Here, it does not appear the trial court made such a factual determination. We are loath to do so in the first instance on this appeal. Assuming the statements were sufficiently reliable, we therefore assume further that their exclusion was error.

That error, however, does not compel reversal; the question of prejudice remains. Assuming the trial court abused its discretion in barring the admission of this testimony, we may not reverse or set aside the judgment unless, in light of the entire record, we

> conclude the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) We cannot so conclude in this case.
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> The body of evidence against appellant was extensive and compelling, as we have set out in some detail. Numerous witnesses testified appellant not only threatened the lives of the victims on several occasions during the days just before the killings, but he also acknowledged committing the murders soon afterward. At least one of the murder bullets was identified as having been fired from appellant's gun. Several witnesses saw that gun in appellant's possession both immediately before and immediately after the murders. Other than Neundorf's hearsay statement to Morse that Borelli told her he had the murder weapon, there was no other evidence Borelli ever had possession or control of the gun used to kill the victims. Even accepting Borelli's alleged statement to Neundorf at face value, there is nothing to indicate when he might have had possession of the gun, or what the circumstances of his possession were. Indeed, whether or not Borelli said he had possession of the murder weapon, nothing in appellant's proffer suggests he ever admitted committing the murders.
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> Finally, Neundorf's reported statements to Morse had obvious indicia of unreliability. Not only were Neundorf's statements hearsay, but they were themselves chiefly concerned with alleged double hearsay statements by Borelli concerning his supposed possession of the murder weapon. Appellant's main reason for seeking admission of this double hearsay was as proof of the facts asserted. Thus, the reliability of both Neundorf and Borelli himself was placed in issue by Morse's proffered testimony. The testimony consists of jailhouse assertions that the declarant lied under oath during her previous testimony, which assertions the defense now seeks to admit as the truth without any chance for testing by cross-examination. Given her incarceration, Neundorf's motives for making the supposed admissions are certainly suspect. Under all these circumstances, there is only a remote chance a reasonable jury would have given substantial weight either to Neundorf's hearsay statements to Morse, or to the double hearsay statements of Borelli that Neundorf reportedly recounted. On this record, we conclude it is not reasonably probable that a result more favorable to appellant would have occurred in the absence of the trial court's error in articulating its reasons for denying admission of this evidence. (Cal. Const., art. VI, § 13; Cudjo, supra, 6 Cal. 4th at pp. 612-614; People v. Watson (1956) 46 Cal. 2d 818, 836.)

Exh. D to Ans., pp. 58-65.

Although the state appellate court found that it was a state law evidentiary error for Neundorf's testimony to have been excluded (albeit adjudged "harmless)," that is not the

analysis relevant in this court. The real federal issue is whether the exclusion of the impeachment testimony unfairly fettered petitioner's right to present a defense. And, this preclusion of defense has been discussed previously.

For the sake of efficiency, the court will assume that constitutional error occurred in not permitting the Neundorf impeachment. In assessing the Brecht standard,[22] the court is again compelled to determine whether exclusion of this evidence had a substantial and injurious effect on the outcome of petitioner's trial, i.e., is the court's confidence in the outcome of the verdict undermined. Like the Court of Appeal, the undersigned cannot agree with petitioner. Given the circumstances, petitioner overestimates the effect of the alleged impeachment. Petitioner called the "actual killer" [or his accomplice], Borelli, as a defense witness, then *stipulated* to the offending testimony of Neundorf, and lastly attempted to overcome all this with the testimony of a defense investigator recalling the "just the other day" contradictory statements of the non-appearing witness. Probably, petitioner hoped to dirty Borelli on direct, and apply the coup de grâce to both Borelli and Neundorf with the investigator's evidence of Neundorf's deceit which would then (hopefully) also rub off on Borelli. However, a reasonable jury would not have been persuaded by what is unconfrontable hearsay (regardless of any exception). While the

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[22] Petitioner emphasizes that the state court erred in applying the "harmless error" standard found in People v. Watson , 46 Cal. 2d 818, 836, 299 P. 2d 243, 254 (1956), which requires setting aside a judgment only upon a finding that, inter alia, " the improper admission or rejection of evidence," resulted in a "miscarriage of justice" which "should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." Watson, 46 Cal.2d at 834, 836. In arguing for the application of the Chapman harmless error test, petitioner concedes, correctly, that this court may be constrained to follow the prejudice inquiry set forth by Brecht. Traverse, p. 18. This circuit has unequivocally determined "that the Brecht standard should apply uniformly to all federal habeas corpus cases under § 2254." Bains v. Cambra, 204 F.3d 964 (9th Cir. 2000). The Ninth Circuit has also clarified that the Watson harmless error standard applied by California state appellate courts to trial errors of non-constitutional magnitude "is the equivalent of the Brecht standard under federal law...whether the errors had a 'substantial and injurious effect or influence in determining the jury's verdict.'" Bains, 204 F.3d at 971, n. 2, citing, inter alia, Duncan v. Henry, 513 U.S. 364, 366, 115 S.Ct. 887 [] (1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 636-38, 113 S.Ct. 1710 [](1993)).

tactic was within the reasonable bounds of counsel competence, it was a longshot, and in light of the entire record, not all that impressive.

This claim should be denied.

G. Trial Court's Exclusion of the Prior Acts of Violence of the Actual Killer's Accomplice Violated Fry's Right to Present a Defense

For the same reason that this court finds that petitioner has waived any argument in support of claim 5, the undersigned finds that petitioner has waived any argument as to this asserted ground for relief. In his amended petition, petitioner states only that this issue has been fully briefed "during the course of direct review, and in Fry's pro se petition." AP, p. 88. In the traverse, in response to respondent's apparently unacknowledged opposition, petitioner asserts only "[t]his issue has been adequately briefed in Fry's post-conviction briefing and in the Attorney General's Answer," submitting the issue "without further briefing." Traverse, p. 61. No case authority is cited in the pro se petition as to this claim. Petition, p. 5(e). Moreover, petitioner's briefing on direct appeal to the state courts did not provide adequate argument and case authority to frame a claim that petitioner had been deprived of a federal constitutional right on this ground. Exh. A to Ans., pp. 93-100; Exh. C to Ans., pp. 22-26; Exh. E to Ans., pp. 4-8; 21-22.

As previously noted (see claim 5 discussion, supra), a bare contention, unsupported by explanation or authority, is deemed waived. See FDIC v. Garner, 126 F.3d at 1145; Seattle School Dist., No. 1 v. B.S., 82 F.3d at 1502; see also Pelfresne v. Village of Williams Bay, 917 F.2d at 1023; Johnson v. Indopco, 887 F. Supp. at 1096. Arredondo v. Ortiz, No. CV-01-00788-ABC, 2004 WL 834782, at * 2 (court declines to address an issue that was only mentioned but not argued). Because petitioner has not briefed this ground for relief in this court, it is a bare contention without supporting argument or authority and is deemed abandoned and/or waived. Having been waived, this claim has been rendered moot and must necessarily be denied.

H. Trial Court Violated Fry's Sixth and Fourteenth Amendment Rights by Directing the Jury to Continue Deliberating, When, after Nine Court Days of Deliberations, the Jury in the Third Trial Had Declared That it Was Deadlocked 7 - 5, with Nine of the Jurors Informing the Court That Further Deliberations Would Be of No Avail

Petitioner maintains that the trial judge compelled jurors, who had participated in extensive deliberations and had informed the court that, by a large majority, they believed themselves to be deadlocked, to reach a verdict in violation of petitioner's constitutional rights to due process and to a fair trial. The state court of appeal fairly sets forth the facts of this claim, with any necessary modification noted:

> On May 16, 1995, after 11 days of deliberations,[23] the jury sent the trial court a note from the foreperson stating that she believed "we are deadlocked at this point," and asking the trial court: "Do you have any suggestions for us regarding what we might do to break the deadlock?" The trial court called the jury into the courtroom and asked the foreperson whether (a) if the jury continued in its deliberations, the foreperson thought there was a reasonable possibility that the jury might arrive at a verdict; and (b) whether there was anything further the trial court could do to assist the jury in arriving at a verdict. The foreperson responded that the jurors were "just looking for . . . anything that the Court might suggest that we could try to do to break, the deadlock." The trial court inquired how the jury was split, and was told that after four votes, the jury was split seven to five.
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> The trial court admonished the jurors that each party had a right to the jurors' own individual opinions; "everybody is entitled to their own opinion as a juror"; the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations; "until you are convinced that you are wrong, then you should stick to your vote"; "if a verdict can be reached, then we want a verdict to be reached"; and "[i]f a verdict can't be reached, then that's just the way it is." The trial court then polled the jury to determine whether they individually believed further deliberations would be useful. Seven jurors agreed with the foreperson that their deliberations [sic]"hopelessly deadlocked"; one "[h]esitantly" agreed; one was undecided; and two disagreed. On the basis of this poll, the trial court sent the jurors back to deliberate further,

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[23]In his traverse, petitioner correctly notes (at least according to the record) that the jury deliberated for nine (9) days rather than 11 days prior to the jury foreperson indicating that the jury might be deadlocked. Ap, p. 62; CT 929-936; RT 5123 - 5154-7.

> again instructing "that if you are convinced that you are wrong, then you should change, [but] if you are not convinced, . . . you should stick with you own vote. The trial court told the jurors it would check with them the next day "as to what, if any, progress" had been made, "and if not, then we can go from there again."
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> At that point, the foreperson asked for further clarification of the concept of reasonable doubt. The trial court told the foreperson to reread the instruction, and added that "it's really you, as individual jurors, when you read that instruction, to apply it and then give it the meaning to which you feel it's entitled." Thereafter, the jury deliberated for two days without communicating with the court. On May 19, the jury requested a read back of some portions of trial testimony, and informed the court it had selected a new foreperson. On May 22, the trial court suggested making an inquiry about whether the jurors felt they were making progress, but the prosecutor objected on the ground that "[t]hey're obviously working," and "if they haven't brought the subject matter up with the Court, we shouldn't be bringing that up." The jury was brought in, and the new foreperson indicated the jury's willingness to continue deliberations the next day.
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> On June 1, the trial court sua sponte asked the jury to come into the courtroom to inquire whether there had been any progress in the deliberations. At that time, the new foreperson stated: "Yes, there has been some change." The trial court reread CALJIC No. 17.40 instructing the jury that both sides were entitled to the individual opinion of each juror; each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; and although each juror was not to hesitate to change an opinion if convinced it was wrong, he or she was not to decide any question in a particular way just because a majority of the jurors, or any of them, might favor such a decision. Upon seeing "all affirmative nods" from the jurors in response to its question whether further deliberation would be helpful, the trial court sent them back to deliberate. On June 8, the jury returned verdicts of guilty on both counts.

Exh. D to Ans., pp. 39-41.

Although as to this claim petitioner merely incorporates by reference his pro se petition and briefing on direct appeal in his amended petition, he does brief the issue in his traverse. Traverse, pp. 62-68. The pro se petition, without citing case authority, at least raises the issues sufficiently for respondent to have adequate notice such that the belated briefing in the traverse does not unduly prejudice respondent. Petitioner emphasizes the two prior mistrials as a

result of deadlocked juries; that daily deliberations in the third trial were scheduled from 9:00 a.m. to 5:00 p.m.;[24] that while evidence was presented to the jurors over 29 court days, the jury deliberated for 23 court days before reaching a verdict; that nine of the jurors on May 16, 1995, after being polled by the trial court, agreed that they were deadlocked and that further deliberations would be fruitless; that 14 of the days that jurors deliberated occurred after the majority of jurors believed the jury to be deadlocked. Traverse, pp. 62-63, CT 822-857; RT 5126, 5154-5 - 5154-8. Respondent points out that one of the nine who believed that the jury was hopelessly deadlocked expressed this belief "hesitantly"; of the remaining three jurors, one was undecided and two did not believe there was a hopeless deadlock. Ans., p. 28, RT 5154-7 - 5154-8.

Petitioner cites Supreme Court authority pointing out the risk that is run if jurors are inordinately pressured to reach a verdict following a deadlock after having made exhaustive efforts. Traverse, p. 65; Arizona v. Washington, 434 U.S. 497, 509, 98 S. Ct. 824, 832 (1978) (if a trial court judge fails "to discharge a jury unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.").[25] Petitioner cites Arnold v. McCarthy for the principle that "[c]oercion of an already exhausted jury to continue deliberations may induce jurors to accommodate a verdict which they would not otherwise support." 566 F.2d 1377, 1387 (9th Cir. 1978). While the theory of petitioner's cited cases is no doubt true in the abstract, the Ninth Circuit also observed (in Arnold v. McCarthy) the following

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[24] The record indicates that jurors had a lunch break of an hour and a half scheduled. RT 5126.

[25] Noting that the "public interest in fair judgments is not of recent origin," the high court quotes from an early case: "'if a jury cannot agree, we ought not to coerce them by personal suffering, nor ought we to expose the parties to the danger of a verdict which is not the result of conviction in the minds of the jury, but produced by suffering of mind or body.'" Arizona v. Washington, 434 U.S. at 510 n. 27, 98 S. Ct. at 832 n. 27 (quoting The Queen v. Charlesworth, 1 B. & S., at 503-504, 121 Eng. Rep. at 802..

in assessing whether the trial court had exhibited a proper exercise of discretion in declaring a jury deadlocked:

> Upon receiving a communication from the jury that it cannot agree, the trial court must question the jury independently to determine whether further deliberations might overcome the deadlock. [Citations omitted]. Merely questioning the jury foreman may not be sufficient, but this circuit has recently held that questioning the foreman individually and the jury either individually or as a group is satisfactory.

Id.

In this case, the record demonstrates that in determining not to declare a mistrial upon the jury's majority declaration that they were deadlocked, this court not only spoke with the foreperson, but also polled the jurors to determine each of their positions. The judge should question the jury in such circumstances, either individually or through its foreman, on the possibility its current deadlock could be overcome by further deliberations. The trial judge did not simply direct the jury to resume deliberations without any inquiry or further direction, as was the case in Krische v. Smith, 662 F.2d 177 (2d Cir. 1981), cited by petitioner as grounds for granting habeas relief. Traverse, p. 65.

Petitioner notes that prior to bringing the jury back to the courtroom on June 1, 1995, the court expressed concern that a juror had remarked to a court reporter during a testimony readback that "'if they [did not] reach a verdict by July 1st, she felt she might lose her job." Traverse, p. 64; RT 5233. The fact that a juror may have been concerned about whether or not her job would be in jeopardy if a verdict (or, presumably, at least some resolution) were not reached fully a month beyond when the judge makes his remark does not appear to lend itself to coloring the deliberations as coerced.

Upon bringing the jury to the courtroom on June 1, 1995, petitioner observes that the court made the following remark, despite the fact only two of the twelve jurors had definitively stated that the jury was not deadlocked:

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> [S]ome days ago when the jury indicated that it was deadlocked,...the court then made certain inquiries of the jury. And after that, *the jurors had indicated to the court that they felt that further deliberation would be fruitful*, and therefore the court returned the jury for further deliberation.

Traverse, p. 64; RT 5235 [emphasis added].

While it is plain that the court would have been more accurate to say that two, or possibly three, of the jurors had indicated the further deliberation could have proved fruitful, sending the jury back for further deliberation even after it has declared itself completely deadlocked is not, of itself, tantamount to coercion. Rodriguez v. Marshall, 125 F.3d 739 (1997), overruled on another ground by Payton v. Woodford, 299 F.3d 815 (9th Cir. 2002). In Rodriguez, the Ninth Circuit found that the jury had not been coerced where "the jury declared itself deadlocked on four occasions, and yet the judge refused repeated defense requests to declare a mistrial." 125 F.3d at 748-749.

A court must apply a "totality of the circumstances" test when considering whether a verdict was coerced by actions of the trial court. Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 365 (2002)[26]; Lowenfeld v. Phelps, 484 U.S. 231, 248-250, 108 S. Ct. 546, 556-557 (1988); Jiminez v. Myers, 40 F.3d 976 (9th Cir. 1994) (trial court's comments and conduct following two impasses in jury deliberations on attempted murder charge amounted to giving jury de facto Allen charge,[27] which instructs jurors to work toward unanimity and minority to reexamine its views, where the judge twice inquired into the jury's numerical split after they had declared that they were deadlocked, twice noted that he was looking for movement toward

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[26]Compliance with Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, however, "does not demand a formulary statement that the trial court's actions and inactions were noncoercive 'individually and cumulatively.' It suffices that that was the fair import of the Court of Appeal's opinion." Early v. Packer, 537 U.S. at 9, 123 S. Ct. at 365.

[27]Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896). The Supreme Court has noted: "California law, unlike federal law, prohibits the giving of a so-called Allen []charge to a deadlocked jury—that is, a charge that specifically urges the minority jurors to give weight to the majority's views." Early v. Packer, 537 U.S. 3, 6, 123 S. Ct. 362, 364 (2002) (citing People v Gainer, 19 Cal.3d 835, 852, 139 Cal. Rptr. 861 (1977).

unanimity, and refused to grant a mistrial where both the defense and prosecution agreed th . further deliberation would not be useful); Rodriguez v. Marshall, 125 F.3d 739 (verdict not coerced where the jury declared itself deadlocked on four occasions over the course of fifteen deliberation days and the trial judge refused repeated defense requests to grant a mistrial, trial judge commented on evidence which the jury had requested and remarked upon weaknesses in the testimony of one defense witness, and on the eleventh day of deliberations trial judge inquired into the numerical split of the jurors on the balloting and again denied a motion for a mistrial).

The state appellate court observed in this case:

> That record clearly shows the trial court did nothing to coerce the jury, and did not abuse its discretion in having the jurors continue their deliberations after inquiring into the numerical division of voting and individually polling the members in an effort to see if there was anything it could do to assist them in their deliberations to reach a verdict. The trial court made no threats or other statements that could be interpreted as exerting undue pressure on any juror; nor did it ever indicate that it was necessary for the jury to reach a verdict. The trial court never expressed an opinion on appellant's guilt or innocence of the charges; nor did it comment on the evidence. Indeed, appellant's assertions notwithstanding, the trial court specifically told the jury they were not required to return a verdict.
>
> > [Footnote 12] The trial court stated: "If after there's a vote or two votes or three votes or, as in your case, four votes, if you are shown that you are wrong or that the evidence does not support your vote, then you should, as the law says, unhesitatingly change. [¶] But until you are convinced that you are wrong, then you should stick to your vote, and that's what was carefully pointed out by both attorneys, and that's the law that I gave you during the instructions. [¶] So with that, the question then boils down, if you wish further deliberation, and you have been in deliberation for quite a period of time-and all of you, the Court knows, were very attentive throughout the trial. We went through a long time. . . . But if a verdict can be reached, then we want a verdict to be reached. If a verdict can't be reached, then that's just the way it is. It's not to-because everybody is entitled to their own

opinion as a juror."

> Thus, the trial court specifically reinstructed that (a) each party had a right to the jurors' own individual opinions and each juror was entitled to his or her own opinion; (b) each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; (c) although the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations, they should not decide any question in a particular way just because a majority of the jurors, or any one of them, might favor such a decision; (d) "until you are convinced that you are wrong, then you should stick to your vote"; (e) the individual jurors should interpret and apply the instructions themselves; and (f) although a verdict should be reached if possible, "[i]f a verdict can't be reached, then that's just the way it is." The trial court only had the jury continue deliberations after it became apparent that some jurors believed further deliberations would be useful, and that it would be possible to reach a verdict. On this record, the trial court's actions were clearly not coercive and not an abuse of discretion. [Citations omitted.]

Exh. D, pp. 43-44.

Again, the undersigned does not consider the issue de novo, but ascertains whether the legal conclusion of the Court of Appeal was "unreasonable." The undersigned cannot say that it was. There is no evidence that the jury members believed they had to reach a particular verdict; the trial judge did not at any time pressure the jury to do so. Although the trial judge asserted that "[i]f a verdict can be reached, then we want a verdict to be reached," he added that "[i]f a verdict can't be reached, then that's just the way it is." RT 5154-7. While he advised jurors that "if you are shown that you are wrong or that the evidence does not support your vote, then you should, as the law says, unhesitatingly change," he also counseled that "until you are convinced you are wrong, you should stick to your vote...." RT 5154-6 - 5154-7. The court further notes that petitioner did not request a mistrial. Additionally, it is constitutionally permissible for a state trial judge to inquire into the numerical division of the jury, so long as the context of the inquiry does not suggest that the jurors were coerced into changing their views.

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See Locks v. Sumner, 703 F.2d 403, 406-7 (9th Cir.1983); Jiminez, 40 F.3d. at 981.[28] There is no evidence here that any juror was coerced to change his/her vote. Rather, it appears that the jurors reached an impasse at one point in a difficult case, later changed forepersons, continued to request and listen to testimony readbacks, and were ultimately able to reach unanimity. Even in light of the two earlier mistrials, and the extended deliberation period in this case, the Court of Appeal did not rule unreasonably when it found that the circumstances herein did not have a coercive impact on the jury.

Accordingly, this claim should be denied.

I. Trial Court Violated Fry's Sixth and Fourteenth Amendment Rights During Jury Deliberations by Editing Requested Testimony Read-backs in a Misleading Manner That Was Favorable to the Prosecution.

For the reasons set forth by the court with respect to claims 5 and 7, the court finds that petitioner has also waived this challenge to his conviction, having provided no briefing on this issue within his amended petition or traverse.[29] This abandoned claim must be denied.

VII. CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that the petition be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

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[28] If this were a federal case, the trial judge's inquiry into the numerical division of the jury would have required reversal. Brasfield v. United States, 272 U.S. 448 (1926). Since Brasfield's per se rule rests on the supervisory power, it does not apply in federal habeas review. Lowenfield v. Phelps, 484 U.S. 231, 239-40 & n. 3 (1988); Locks v. Sumner, 703 F.2d 403, 406 (9th Cir.1983).

[29] None of petitioner's briefing on direct appeal to the state courts on this issue adequately implicated federal constitutional issues. Exh. A to Ans., pp. 81-88; Exh. C to Ans., pp. 15-17; Exh. E to Ans., pp. 13-19.

"Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 28 2004.

GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:009
fry1580.fr

FILED

AUG 27 2004

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN FRANCIS FRY,

Petitioner, No. CIV S-01-1580 FCD GGH P

vs.

CHERYL PLILER, Warden,

Respondent. ORDER

_____/

Petitioner, a state prisoner proceeding with counsel, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On June 2, 2004, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations. Respondent has filed a response to petitioner's objections.[1]

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[1]Respondent was granted an extension of time to file a response to the objections by order filed on July 8, 2004.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed June 2, 2004, are adopted in full; and

2. The petition is denied.

DATED: August 26, 2004

UNITED STATES DISTRICT JUDGE

/fry1580.805hc

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHN FRANCIS FRY, Defendant and Appellant.	A072396 (Solano County Super. Ct. No. C34299)

John Francis Fry was convicted of two counts of first degree murder and sentenced to life imprisonment without the possibility of parole. On appeal, he contends we must reverse his conviction because there was insufficient evidence to support the jury's verdicts; the trial court erred by ordering the jury to continue deliberations after nine jurors informed the trial court they did not believe further deliberations would be beneficial; the trial court erred in its editing of certain testimony read-backs requested by the jury; and the trial court erred in various of its rulings dealing with the admission of witness testimony and cross-examination. We affirm the judgment.

I. FACTUAL AND PROCEDURAL HISTORY

Because the central issue on this appeal is the sufficiency of the evidence to support the murder conviction, we are required to review the extensive evidence in the lengthy trial record to determine whether the judgment was supported by substantial evidence. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 63; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578)

THE CRIME

Between 6:15 and 6:30 a.m. on October 27, 1992, the bodies of James and Cynthia Bell[1] were discovered in a white 1978 Camaro automobile parked on the dirt shoulder of Interstate 505 near the freeway intersection with VacaValley Parkway. Both victims had been shot. Cynthia's body was on the driver's side, with the window down. The victim's left arm was resting on the door sill, and her body was turned to the left as though she had been talking to someone outside the vehicle. According to witnesses who first saw the body, the upper portion of Cynthia's head was "missing." James's body was in the front passenger seat, slumped toward Cynthia's body. The car keys were in the ignition and turned to the "on" position. However, the engine was not running; the gas tank was empty, and the battery was dead. Black, sooty carbon deposits were visible directly below the tailpipe, indicating the car had been idling for some period of time at that location. There was an empty paper soft-drink cup from a Chevron minimart between James's thighs.

When police officers and paramedics arrived at the scene between 7:00 and 7:30 a.m., they found the bodies "ashen," "very cold, "very firm," and mottled or marbled in appearance. Pictures were taken of the victims' bodies and the crime scene between 8:30 and 10:00 a.m., before the bodies were moved or disturbed. By the time the coroners removed the victims from the car between 11:00 and 11:30 a.m., the bodies were totally rigid and stiff, and retained their postures when moved.

Three bullets were recovered: one from James' cheek; a second from the passenger door; and a third from the rear floor of the Camaro behind the passenger seat. Dr. Aaron Lipton, the pathologist who performed the autopsies on the victims, testified that Cynthia had sustained "massive damage" to the upper part of her face and skull,

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[1] At various points during the trial, Cynthia Bell was also referred to as "Cynthia Edon." For consistency, throughout this opinion we will refer to the female victim in this case as Cynthia Bell.

"with a large area of these areas of the face and skull absent . . . [a]nd a large portion of the brain material beneath the skull also absent." Dr. Lipton opined that the gunshot wound to Cynthia's head, which was the cause of her death, was the result of someone shooting her in the face from only inches away. Under the circumstances, the shooter "[p]ossibly" would be "covered with blood and tissue" from the victim. James had a total of eight bullet wounds on his head, chest, back and wrist; death resulted from the wounds to the head and lungs. Dr. Lipton opined that James' wounds were caused by shots fired at him from the driver's side of the car.

Based on the photographs of the victims taken after their bodies had been taken out of the Camaro, Dr. Lipton opined that they appeared to be "in full rigor mortis," a condition which, in a temperate climate like that present at the time and location of the crime, usually develops "between six and twelve hours" after death and then subsides within 36 hours. Rigor mortis would manifest by a "very firm" condition of the muscles directly under the skin. At the time he performed the autopsies, beginning at approximately 8:30 a.m. on October 28, 1992, Dr. Lipton noted only "mild" or "moderate" rigor mortis remaining in the victims' bodies. On cross-examination, Dr. Lipton testified that he originally estimated the victims had died three or four hours before the bodies were found, based on the pictures and the descriptions given by the police investigators. However, he also testified there are many different variables affecting the accuracy of any estimate of the time of death based on rigor mortis.

Several witnesses testified to having seen an older-model white Camaro, matching the description of the victim's car, parked at the crime scene between approximately 8:30 and 10:00 p.m. on October 26, 1992, in the same location and position where it was subsequently found with the victims' bodies the next morning. At least four different witnesses also described seeing an older-model pickup truck with a light-colored camper shell parked near the Camaro at some point during this time period.

Two other individuals testified that they encountered the victims and their white Camaro at a nearby convenience store sometime between 8:40 and 9:00 p.m. on the

evening of October 26, 1992. Both witnesses testified they saw James talking on a pay telephone, and heard Cynthia say something referring to "Leroy." Neither witness could tell whether Cynthia was talking to James about someone else named "Leroy," or addressing James by his own middle name of "Leroy." A third witness saw both victims sometime between 9:30 and 10:00 p.m. on October 26, 1992, at the Chevron minimart where she worked as a cashier. James purchased a soft drink at the time.

PROSECUTION WITNESS TESTIMONY

Several prosecution witnesses testified to appellant's erratic behavior during the weeks prior to the murders. Arleen Murphy had known appellant for 32 years, although she had lost touch with him for about 10 years until meeting him again in October 1992. On October 24, 1992, appellant drove Murphy to Davis in his blue truck with a white camper shell on it. As he "always" did, appellant had a gun in a case on the dashboard of his truck. He was also carrying a second gun in his belt. After driving Murphy out a back road and stopping in an isolated location on a levee, appellant told Murphy he was upset because he thought she was in league with their mutual acquaintance Ryan Bernal to steal $1,300 from him, and it was time for her "to go to sleep." Murphy tearfully tried to tell appellant she had no reason to steal from him. Saying he "had to show somebody up north that he had killed" her, appellant held his gun out of the window and fired two shots into the air. Appellant then told Murphy "he was going to get to the bottom of why . . . he was being told [Murphy] was going to steal" his money. Then appellant drove Murphy back to a gas station where Murphy's aunt, Lynn Ruiz, worked. Appellant again told Murphy "[s]ome people up north" were supposed to think she was dead, and to stay in hiding for a couple of days "so he could get to the bottom of this."

Murphy next saw appellant on the morning of October 26, 1992, when she unexpectedly found him sitting on a couch in the apartment of one of her friends where the front "door had been kicked in" and was off its hinges. Appellant told Murphy he had arranged a meeting at his house with her aunt Ruiz, "to get to the bottom of this and find out what was going on." Appellant drove Murphy in his truck back to his house. Murphy

then paged Ruiz, who arrived several hours later. At various points during the afternoon, Murphy saw a number of people at appellant's residence, including appellant's girlfriend Betty Jo Ringler; appellant's brother Edgar Fry; Shannon Nissen; Debbie Mathies; and Bernal. Murphy did not participate in the conversation between appellant and Ruiz. After talking with Ruiz, appellant assured Murphy everything "was going to be okay" between them. Around 5:30 p.m., shortly after Ruiz left, the two victims arrived and stayed awhile. Murphy could not recall seeing them leave. Later, appellant asked Murphy to purchase a gun for him from David Sparks, one of two other men who had arrived at the house, saying she "could get it cheaper" than he could. Murphy declined.

In order "to make sure everything was cleared up," Murphy asked appellant if she was "free to go." Appellant said, "Yes." Then he told her he was "going to go kill" Cynthia and James Bell because Cynthia had stolen from him and broken into his house. Appellant had thought Murphy knew the Bells, which had caused him to suspect Murphy of being involved in a plot against himself. Appellant wanted Murphy to go with him, but she refused. Appellant then left with Bernal, and Murphy left appellant's house shortly thereafter.

On cross-examination, Murphy testified that she did not immediately call the police to tell them about appellant's threat to kill the Bells because she "was really upset and stressed" and "didn't think he was serious." She did not tell the police about appellant's statement for at least a month because appellant had not yet been arrested and she "was really scared" of him.

Lynn Ruiz, Murphy's aunt, had been friends with victim Cynthia Bell for 15 years, and had known James Bell for about 5 years. On October 24, 1992, she saw Murphy and appellant at the gas station where she was working. Murphy appeared "nervous" and "antsy," like she was "in a hurry or bothered or something." At approximately 1:30 p.m. on October 26, 1992, Ruiz received a page from a telephone number she did not recognize. When Ruiz returned the call, appellant identified himself, stated he had asked Murphy to place the page for him, and said he wanted to talk with Ruiz about Cynthia.

Appellant gave Ruiz his address and asked her to stop by his home after she got off work. Ruiz agreed.

When Ruiz arrived at approximately 4:00 p.m., she found appellant outside his house by his "old," "bluish" pickup truck. Appellant told Ruiz he was "upset" with Cynthia because she owed him $600 to $800 for drugs and "[h]e thought she was trying to rip him off." Appellant described an incident in which Cynthia had entered his house without his permission and "was shocked" when she opened his bedroom door and found him there. He believed Cynthia was trying to steal methamphetamine from him, and he wanted to talk to Ruiz about it because both Cynthia and Murphy had mentioned her name and "respected [her] opinion." Ruiz agreed that Cynthia was probably trying to steal drugs from appellant, and told him to "[k]iss her off," "stay away from her," and "ignore her." Appellant told Ruiz he had been upset with Murphy because he thought she was involved in a conspiracy with Bernal and others "to rip him off also," and described the incident in which he had taken "her for a ride out to the country," "scared her and threatened her," and "took his gun and told her he was going to blow her away . . . if she didn't explain . . . ." He had pointed his gun at Murphy's head, and had then fired "a couple shots out the window to scare her or something." Appellant told Ruiz that Murphy and Bernal "had to prove their loyalty." He "wanted to blow everybody away," and had only refrained from killing Murphy because he had "known her for 20 years" since they "went to school together."

The next day, Ruiz heard about the discovery of the bodies by the freeway, and was worried it was Cynthia and James Bell. She drove to the victims' apartment to check on them. She found the apartment dark and a police officer present. She told the officer about her conversation the day before with appellant, in which appellant had been upset with the Bells because he thought they were trying to steal drugs from him, and "he wanted to blow everybody away." The following day Ruiz gave a taped interview to the police in which she stated that appellant had talked about taking his gun and blowing Cynthia's head off.

Lynn Reed was another long-time friend of Cynthia Bell and Murphy. She had purchased drugs from appellant as well as used them with him. In the early afternoon on October 25, 1992, appellant came to Reed's house looking for Murphy. Appellant was "[u]pset, angry, [and] frustrated" because, he said, Cynthia had stolen "[a] large amount of drugs . . . from his house." Appellant told Reed that Cynthia had come into his house by a sliding glass door when she thought he was not at home and had stolen drugs from him while he hid in his closet and watched her. Appellant came by Reed's residence again around 6:30 p.m. on October 26, 1992, driving his "baby blue" pickup truck with a camper shell on it, and accompanied by a "young man." Appellant wanted to purchase an ounce of methamphetamine for $900. He offered a gun for collateral when Reed replied that amount of drug would cost $1,100. When no agreement was reached, appellant left appearing "really anxious and frustrated."

Kathleen (Debbie) Mathies's testimony at an earlier trial was introduced through reading a transcript.[2] Mathies testified that she was alone with appellant in his house a "couple" of days before the murders when someone knocked on the door. Mathies could see through a window that it was Cynthia Bell, and she informed appellant of that fact. Appellant told Mathies not to answer the door. Mathies went upstairs to see appellant in his bedroom, and closed the bedroom door. Cynthia went around to the back of appellant's house and entered through a sliding glass patio door. She then came upstairs and opened appellant's bedroom door. Cynthia appeared "shocked" and "surprised" to find that someone was there, and said she just wanted "to see what was going on" at the

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[2] In connection with Mathies' testimony, the trial court told the jury: "Counsel and the Court have been going over a transcript of the prior testimony in September of 1994 of the witness Debbie Mathies. We had anticipated that Debbie Mathies would be here earlier this week, and then even as late as today, and counsel have agreed that we can read her testimony and make a finding that she's unavailable for trial because of her voluntary use of drugs and unable to testify. And the fact that she is unavailable is in no way connected to any acts or influence of the defendant, Mr. Fry. This lady is unavailable for the reasons of her own voluntary use of drugs."

house. After a few minutes, Cynthia left. Later, Mathies overheard appellant tell Ringler that he was going to kill Cynthia because "she did him wrong" over "[d]rugs and money." Mathies was also present at appellant's house on October 26, 1992, the day of the murders. At some point that day, she again heard appellant say he was going to kill Cynthia, and complain that Cynthia "owed him money for drugs, and they are lying and doing him wrong." Mathies had been using methamphetamine, marijuana and alcohol during the entire time period at issue.

In addition to Murphy, Ruiz, and Mathies, three other witnesses—Shannon Nissen, David Sparks and Edgar Fry—testified about appellant's actions in the days leading up to and including October 26, 1992, the date of the murder. A few days before the killings, appellant informed Nissen that Cynthia owed him $800 for drugs, and that Cynthia had told his girlfriend Ringler that appellant was sleeping with Cynthia. Appellant "wasn't happy" about this. Appellant's brother, Edgar Fry, testified that during the day on October 26, appellant told him that "a day or so before this time" Cynthia had come into his residence without permission, and he had caught her coming up stairs. Appellant appeared "[i]rritated"; he told Edgar he believed Cynthia had intended "[t]o steal his drugs." Appellant had a .357 revolver which he "usually" took with him whenever he left the house, carried in a soft tan-colored canvas case.

On October 26, 1992, Nissen was at appellant's residence with appellant, Bernal, Murphy, appellant's brother Edgar, and Ringler and her two girls. Victims Cynthia and James Bell were also present for some period of time during the day. In addition, Sparks and his friend Jason Gibeau arrived at some point in the evening in a dark minitruck. Sparks was carrying a .38-caliber pistol and approximately $1,000 in cash, because he was interested in purchasing an ounce of methamphetamine. There was some discussion between Sparks and appellant about the latter purchasing Spark's gun, but no sale of the gun took place. There was also some discussion of purchasing drugs at appellant's house, but Sparks declined because he already had a deal set up elsewhere. After about 30 minutes, Gibeau and Sparks left in Gibeau's truck. Bernal asked appellant if they were

meeting at "505." Appellant replied, "That will work." Shortly thereafter, between 7:00 and 7:30 p.m., appellant retrieved his gun, and he and Bernal left in appellant's truck after telling Edgar he "was going to go make a drug deal, do some business." At some point thereafter, Cynthia and James Bell also left appellant's house.[3] Edgar testified that Cynthia told him she was going to meet appellant near the "Wild Oates" store. The victims left in their automobile, a light-colored 1970's Camaro.

Sparks testified that after he and Gibeau left in the latter's truck and were on the Interstate 80 freeway to Vacaville, a vehicle pulled up very rapidly behind them. As it came "[a]s close as you could get without touching," Sparks recognized appellant's truck. Both vehicles pulled over to the side of the road, and Sparks got out of Gibeau's truck to talk with appellant. Appellant apologized to Sparks that "things . . . didn't work out at the house," and expressed interest in selling him some methamphetamine. Sparks agreed to ride in appellant's truck and talk with him on condition that appellant would drive him to Vacaville. Bernal got out of appellant's truck and left with Gibeau in the latter's truck.

When Sparks got into appellant's truck, he saw a soft gun carrying case on the seat or the dashboard. Appellant proceeded to drive Sparks around for about 45 minutes, persistently trying to convince Sparks to "put some money up" and "go in" with him on purchasing a larger quantity of drugs, stopping at various locations to talk with different individuals about buying drugs or selling Sparks' gun, and ignoring Sparks' repeated requests to drive him to Vacaville. Sparks began to feel "really uncomfortable." Finally,

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[3] Like much of the testimony in this case, there was some conflict in the witnesses' recollection of when the victims arrived at appellant's house on October 26, 1992, and when they left. As seen, Murphy testified the Bells arrived at approximately 5:30 p.m. shortly after Ruiz's departure, and she did not see them leave. Nissen testified that Cynthia and James Bell were present at appellant's house during the afternoon, and that they left about half an hour after appellant left with Bernal. On the other hand, Edgar Fry testified that the Bells were not at appellant's residence when he arrived there at approximately 5:00 p.m., and did not show up until 30 to 45 minutes *after* appellant left

when appellant stopped at a gas station and walked in, Sparks got out of appellant's truck, approached a motorist, and obtained a ride to Vacaville.

Both Nissen and Edgar Fry testified that Bernal returned to appellant's house sometime later in the evening, stayed for a few minutes, and then left again. Hours later that night appellant returned, driving his light blue pickup truck with the camper shell on it. Nissen, Edgar, Mathies, and Ringler were all at appellant's house when he returned. Edgar, who was not wearing a watch, estimated that it was approximately 10;30 p.m. when appellant returned.

Nissen, Edgar and Mathies each gave somewhat differing accounts of appellant's actions and appearance upon his return home. Nissen testified that appellant was wearing a T-shirt, blue jeans and tennis shoes, and was carrying his gun case. According to Nissen, there were spots of blood on appellant's shirt, his shoes, his forehead, the gun case, and "maybe his pants." Appellant appeared "tired" and "kind of nervous"; he went to the kitchen, wiped his face and forehead with a towel, and then walked up to his bedroom. Edgar testified that appellant was wearing "[p]ants with no shirt," and carrying a "satchel or briefcase." He immediately went "straight upstairs" and into the bathroom off the master bedroom, from which Edgar heard running water. In response to Edgar's question, appellant said he had taken his shirt off because there was blood on it. Edgar saw a large spot of blood on appellant's pants. Mathies saw appellant drive up and then sit in his truck for a while before coming in the house and going upstairs to the bathroom. where he washed blood off his hands. Mathies could not remember whether appellant was wearing a shirt.

Nissen, Mathies, Edgar and Ringler all followed appellant upstairs to his bedroom. Mathies testified that after coming out of the bathroom, appellant said that he had "killed her," and "had to do James, too." He reported that "[h]e blew their heads off with a gun,"

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with Bernal. According to Edgar, the victims stayed for another 30 to 45 minutes and then left.

and that Cynthia's head "looked like spaghetti." He had shot James Bell "a couple of times in the back" after missing with his first shot. According to Nissen, appellant "kind of smiled" and asked him if he "had ever seen what a .357 does to someone's head at close range." When Nissen shook his head "[n]o," appellant said "It's not pretty." Referring to Cynthia Bell, appellant stated "we wouldn't have to worry about her anymore." When appellant announced that the Bells "were taken care of," Edgar asked him if he "had done" Cynthia. Appellant said, "Yes." According to Edgar, appellant said he told Cynthia "she shouldn't have fucked with him," and told James "he was sorry" before shooting him. Like Nissen, Edgar also testified that appellant commented that "you couldn't imagine what a .357 would do . . . [t]o somebody's skull." Appellant pulled a nickel-plated .357 gun out of the gun case and unloaded it. The gun contained four spent shells and two live shells, which both Edgar and Nissen described as .357 "wadcutters." Appellant asked Nissen if he wanted to clean the gun. When Nissen declined, appellant handed the gun to Edgar, who cleaned it for him. Both Nissen and Edgar testified they saw what appeared to be blood on the gun. In addition, Mathies saw blood on appellant's wrist watch, which appellant also asked Edgar to clean off.

Both Mathies and Edgar Fry testified that appellant and Edgar discussed what to do with appellant's bloody clothes. Edgar told appellant that if he "did do it," then "he better get rid of his clothes." Edgar volunteered to take them with him when he left. At first appellant resisted the idea, because he had few pairs of pants and the ones he was wearing "were good pants." Eventually appellant gave Edgar a paper bag, which Edgar assumed contained appellant's clothing. He disposed of it in a dumpster. He knew that he could get in trouble for destroying evidence, but did it because he wanted to help his brother. Appellant left the house again around 11:30 p.m., saying he was going to the Chevron station to "make a transaction." Appellant returned about 20 minutes later. Edgar left appellant's house between 1:00 and 2:00 a.m. that morning.

Nissen spent the night at appellant's house. The next morning, appellant asked him to help take the camper shell off appellant's pickup truck. Appellant was in a hurry;

he told Nissen he "didn't want people to recognize the truck." While they were working on the truck, appellant told Nissen "that he shot [Cynthia Bell] and her boyfriend." Appellant described shooting Cynthia once in the head from the driver's side of the car, after which James Bell had turned toward appellant, put his hands in the air, and said "What the fuck are you doing." Appellant then demonstrated how he had shot James three times, " 'pop, pop, pop.' " Nissen did not report appellant's confession when the police questioned him about the murders on October 28 as they served a search warrant on appellant's residence, because appellant was his friend, and he "didn't want him to get in trouble." In addition, Ringler and appellant both told Nissen that, if asked, he should say appellant was home at the time of the murders. A "couple days" later the police returned to the house to talk with Nissen, and threatened to arrest him for possession and use of methamphetamine. At that point, Nissen decided to tell the police what he knew in order to avoid arrest. On cross-examination, Nissen admitted reading press accounts of the killings before he spoke to the police. However, he testified he never felt threatened by the police to tell anything but the truth, and that he did tell the truth.

Like Nissen, Mathies did not contact the police despite her knowledge of appellant's involvement in the murders. She testified she did not contact the police and initially denied knowing anything because she "was scared." She denied changing her story because the police had threatened to arrest her and take her children away. When she first heard appellant threaten to kill Cynthia Bell, Mathies did not believe it, and simply thought it was "an expression." On cross-examination, Mathies testified that Nissen was not in the bedroom when appellant was cleaning up after the killings.

Edgar Fry testified that during a conversation with appellant after the police first searched appellant's residence and seized his clothing, appellant told Edgar that he had thrown the .357 into the bushes at the Chevron station after he drove by his house and saw police activity there. Appellant said someone named "Mike" picked up the gun for him. A few days after the killing, while they were working on a car together, appellant told Edgar that he had the power "[t]o give or take life." Appellant told Edgar to "[j]ust

keep [his] mouth shut" if contacted by the police. Edgar intended to do so, until contacted by the police and offered immunity for telling what he knew. The police never asked him to say anything but the truth, and never threatened him other than to tell him what he "was up against."

During the search of appellant's home on October 28, 1992, police found a gun box labeled " 'Ruger, Security-six, .357 Magnum Cal. stainless steel.' " The police also found a metal box containing 12 bullets on a bookcase in appellant's bedroom, a loaded Winchester .22-caliber rifle in the living room closet, a "pipe bomb," and a loaded .22-caliber revolver under the seat of a red Chevrolet pickup truck parked at appellant's residence. The police were not able to find any other gun on the premises. There was a white camper shell in appellant's backyard. There were two small .3 gram packages of methamphetamine on the premises, as well as marijuana and drug paraphernalia. Appellant arrived on the premises while the officers were serving the warrant. There was a loaded .22-caliber pistol in his jacket pocket and five additional rounds of .22-caliber ammunition. The police also found a 12-gauge shotgun and a .22-caliber rifle in the blue pickup truck appellant was driving upon his arrival. The white camper shell was subsequently found to fit the blue pickup truck. Appellant was arrested for gun possession and then released.

Police records showed that appellant had registered a Ruger Security Six .357-magnum pistol on May 22, 1991. The gun was light silver in color, with a "brushed," "satin finish" and black rubber grips. An analysis of three of the bullets found at the crime scene showed that two were "semi-wadcutter" style, and one was a "round-nosed" style bullet. All three were fired from a gun with lands and grooves matching those of either a .38-special or a .357-magnum.

On November 10, 1992, Dixon police received a request to "be on the lookout" for appellant in connection with the murders. Police officers observed appellant the next morning and followed him into a gas station. When asked to stay in his vehicle and keep his hands where the police could see them, appellant accelerated his vehicle and quickly

drove out of the gas station. The police activated lights and siren and attempted to execute a traffic stop, but appellant drove on through a stop sign and entered the freeway. Appellant accelerated to a speed of about 90 miles an hour before police were able to force him to stop. Appellant was taken into custody.

The prosecution offered the testimony of Robert Jacobitz, a jailhouse informant. Jacobitz testified that while they were incarcerated in the same facility, appellant asked his advice on joining a prison gang called the Aryan Brotherhood. Jacobitz told appellant that one had to "make your bones" by killing someone before being allowed to join. While together in the law library, appellant told Jacobitz about his case, and said his brother was "the star witness in the case against him." The more appellant talked about his brother, the angrier and more vehement he became, stating: " 'My brother has cost me 2-1/2 years of my life, and now he's trying to cost me my whole life. '" Jacobitz told appellant he should have his brother "whacked, taken care of," i.e., killed. Appellant replied that this would not help because the prosecutor could simply use his brother's testimony from the two previous trials; "[w]hat he needed was his brother to change his testimony to offset other witnesses." Jacobitz told appellant he could arrange to have people call on his brother to coerce him to change his story, possibly by cutting off his finger. Appellant repeatedly stated his intention to kill his brother after he had "let some time pass."

Jacobitz testified that appellant discussed the facts of his case with him in detail. Appellant said he had been "doing a lot of crazy things" during the time just before the murders, "going around kicking people's doors in" and "putting guns to their heads." Because Cynthia Bell owed him money and he had caught her breaking into his house, appellant arranged to meet her in a secluded "undeveloped" area of Vacaville with the intent to kill her. When appellant arrived, the Bells were already there. Appellant told Jacobitz that he walked up to the Bell's car, leaned down and kissed Cynthia on the cheek while she sat in the driver's seat, said something to her, and then "blew her head off" by shooting her once with his .357 handgun. Appellant then reached across her, and said:

" 'I'm sorry, James. You're in the wrong place at the wrong time.' " He then shot James three times. Appellant told Jacobitz that a piece of Cynthia's skull was found 35 feet away, and that he had blood on his shirt, pants and shoes. Appellant told Jacobitz the killings were "almost like a sexual rush." When he returned to his house he was "pumped up" and splattered with blood, and made incriminating statements to his brother and other witnesses. Among other things, appellant told Jacobitz he had said " 'You should have seen what a .357 does to a girl's head.' " Appellant told Jacobitz his brother had disposed of his bloody clothes in a trash can, and that his girlfriend's "best friend," a "black male," had the murder weapon in his possession.

Jacobitz and appellant discussed the various witnesses testifying against him and what could be done with respect to each of them. Appellant reportedly thought Nissen could not "be tampered with" because he was currently living out of state. Appellant thought that because of her heroin addiction, Mathies might be vulnerable to a "hot shot," or mortal overdose. Appellant also told Jacobitz that an out-of-state truck driver claimed to be an eyewitness to the murders and was testifying that appellant was not the murderer. Appellant and Jacobitz "were both laughing" about the truck driver's testimony. Appellant gave Jacobitz the names of his brother, his brother's wife, and the fact they had three children. Jacobitz took notes and wrote down the names. Later, appellant himself wrote down Edgar's name and address on a piece of paper and gave it to Jacobitz. The piece of paper was admitted in evidence at trial.

Jacobitz testified that he decided to contact the authorities and become an informant after appellant told him he would be willing to harm his brother's children. Jacobitz had recently become a father for the first time, and "felt that was wrong." Jacobitz sent the district attorney an eight-page letter detailing what appellant had said,

without asking for any compensation or reward.[4] In return for additional cooperation, Jacobitz subsequently received diversion to a counseling program for a pending domestic abuse charge, and the district attorney agreed to recommend that Jacobitz's parole not be revoked. As a result, Jacobitz testified, he had "been branded a snitch," which "could be a death sentence in prison." During the period prior to trial Jacobitz had been isolated from the rest of the jail population for his own protection. On cross-examination, Jacobitz admitted convictions for robbery and larceny, and acknowledged that he had had access to one of appellant's newspaper clippings on this case.

During the course of renovations to a commercial building at 5141 Quinn Road in Vacaville in May 1993, appellant's gun, a .357 Ruger, was discovered in the metal "channel" of a door frame, inside its tan canvas case. The gun was not loaded, but a speed loader found with the gun contained six bullets. Of the bullets, two were .38's and four were .357's. According to the individual who found the gun, the bullets were "blunt" or "flat" on top. The building where the gun was found was approximately one mile from the location of the murders. The gun was confirmed to be the weapon appellant had previously registered with the Vacaville police. Edgar Fry testified that the gun found in the building on Quinn Road was the same gun he cleaned off on the night of the killings. He also testified that the canvas gun case "looks familiar" and "very well could be" appellant's. An expert criminalist testified that one of the bullets recovered from the victims had definitely been fired from appellant's gun. Two other bullets found at the crime scene "could have been fired from" that gun as well, although there were too few markings on the slugs to be certain they had come from appellant's gun.

Michael Walker testified that in late 1992 he rented space at 5141 Quinn Road for a general repair shop. For the last three months of the year, Walker shared the space with

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[4] According to Jacobitz: "When he told me he had no problem if . . . the . . . last alternative is using the kids to get his freedom, I know that John Fry is out of control and needs to be stopped."

one "Mike Turner." In exchange for his oral promise to pay half the rent, Turner had his own key to the rental unit, "stored some stuff" there, and came and went as he pleased. Near the end of December 1992, Turner "stopped coming around" because of a dispute with Walker over money Walker knew appellant from when they both drove trucks for the same company. About one month before the murders, appellant and Ringler "stopped by" Walker's shop on Quinn Road when he was there. Michael Turner was seen standing across the street from appellant's house at the time the police served the search warrant on October 28, 1992. After the police spoke with Turner briefly, he walked away from the area.

Douglas Carter, a dispatcher at the trucking company for which both Walker and appellant had worked, testified that he helped Walker move his possessions out of the Quinn Road unit in March 1993. One or two days before appellant's arrest, Carter saw appellant outside the offices of the trucking company. Knowing that the police were looking for appellant, Carter asked him "if he killed the kid out there in Yolo County," referring to a recent shooting death. Appellant said, "No," but added that "he killed the people in Vacaville." Appellant told Carter that the people he killed had been "harassing him and his kids," and that "he just went to his pickup, got his gun and killed them." When Carter asked him " '. . . What were you thinking,' " appellant replied, " 'I just messed up.' " When Carter told appellant "he should turn himself in," appellant said, " 'No,' . . . 'they won't catch me.' " Carter did not go to the police with this information because he did not want to get involved. He also did not know whether to believe appellant's confession, "because sometimes he seemed kind of full of hot air."

DEFENSE WITNESS TESTIMONY

In his defense, appellant offered evidence and testimony to show that (a) he was not present at the scene of the crime when it occurred; (b) the prosecution's witnesses were not credible; and (c) at least three other people (Daryl Borelli, Ryan Bernal, and Anthony Hurtz) were linked to the murders, and had means, motive, and opportunity to commit them.

Appellant's girlfriend Ringler and her daughter Cynthia C. gave testimony on the identities of the persons coming, going and staying at appellant's residence on October 26, 1992. Cynthia C. confirmed the testimony of Nissen and Edgar Fry that appellant left the house at approximately 7:00 p.m., shortly after Sparks and Gibeau left; and that Cynthia and James Bell were in the house for at least 20 to 30 minutes between 7:30 and 8:00 p.m. before leaving. Cynthia C. also confirmed that appellant generally carried his handgun on the dashboard of his truck. Ringler similarly testified that appellant "always had his gun with him," and he "always" took the gun with him when he got out of his truck. However, on the day after the murders, when appellant drove Ringler to work in his pickup truck, Ringler could not recall whether he brought his gun with him.

At trial, Cynthia C. claimed she could place appellant's return to the house at precisely 10:01 p.m., because she turned around and looked at the clock when he came in the door. According to Cynthia C., there was nothing unusual about appellant's appearance; he was carrying a black briefcase, wearing jeans and a T-shirt, and appeared "casual." She did not see any blood on him. On the other hand, she admitted originally telling the police she could only estimate the time of appellant's return home as between 9:30 and 10:15 p.m. because she did not look at the clock. Cynthia C. also claimed that Bernal came to the house at 11:00 p.m., about one hour *after* appellant returned; appellant never left the house again that night; and she would have seen appellant leave because he would have walked by where she was watching television.

Ringler testified that on October 23, 1992, she and appellant agreed that Ringler should "take over" appellant's drug business and collect his debts because appellant "wasn't doing very well." After that, "everybody had to deal with" her. According to Ringler, she and Cynthia Bell were "[v]ery good friends"; although she had a serious "fight" with Cynthia on October 24, 1992, they resolved it the next day. Ringler testified that she did not know about the incident in which Cynthia had "broken into" appellant's residence until Cynthia herself told her about it. Ringler did not know what Cynthia owed appellant, although she knew Cynthia owed money for a "sixteenth" of

methamphetamine Ringler had "front[ed]" her. Ringler testified that appellant never gave Cynthia a hard time about the money Cynthia owed him, and she never heard appellant ever say he wanted to harm or kill Cynthia or James Bell. However, Ringler conceded that appellant was angry with Cynthia because of her attempt to break into his residence, with what he believed was an intent to steal drugs; indeed, as a result of that incident, Cynthia and appellant were not speaking to each other and appeared to be trying to avoid each other.

Ringler testified that appellant came home between 10:00 and 10:30 p.m. on October 26, 1992, wearing a T-shirt and pair of jeans. Appellant was "tweaking" on methamphetamine, but otherwise appeared "basically normal for him at that point in time." Ringler did not see any blood on appellant's shirt or pants, or anything in his hands. After a while, appellant went to the Chevron station, and then returned after about 15 minutes. He went straight upstairs without washing himself. Ringler denied hearing appellant talk about harming Cynthia or James Bell that night, hearing any discussion of what to do with appellant's clothing, or seeing any blood being cleaned off appellant's body, gun or watch. Ringler acknowledged that she knew Michael Turner; Turner was "a good friend" of hers; he was present at the house on the night of the search warrant; she introduced Turner to appellant; and she saw Turner alone at the "shop" on Quinn Road where the gun was later discovered. However, Ringler denied ever asking Turner to do anything with appellant's gun. Ringler admitted that she continued to have a relationship with appellant at the time of trial, and that she lied to the police to protect him when initially questioned about his whereabouts on the night of the murders.

Manuel Michel, another "good friend" of appellant, testified that he saw appellant at a liquor store between 6:00 and 7:00 p.m. on October 26, 1992. Later, he went by appellant's house. According to Michel, he was already at appellant's residence when appellant returned that evening, and "was the first one [appellant] saw when he opened the door." He and appellant went upstairs, where they consumed methamphetamine. Michel denied that appellant had any blood on him at the time.

Pete Joy testified that he met appellant at a Chevron station sometime between 10:00 and 10:30 p.m. on October 26, 1992, to buy some methamphetamine. They left around 11:00 p.m. Shannon Joy testified that appellant looked "jumpy and a little shaky." She and her husband sent appellant $80 after his house had been searched, and let him stay in their mobile home.

Ronald Lewis, who had known appellant for about five years as of the time of trial, testified that he saw appellant and Mathies the day after Lewis heard about the murders. Lewis testified that Mathies had a "very bad" reputation for truthfulness.

Charles Morton, a criminalist expert in firearms, testified that there were insufficient markings on the bullets found at the crime scene to match them to appellant's gun. Although he conceded there was "significant agreement" between test bullets fired from appellant's gun and the bullets that killed the victims, he opined the agreement was not "sufficient" to make an identification.

APPELLANT'S TESTIMONY

Appellant testified in his own defense. In October 1992, he owned a 1977 "[p]owder blue" Ford pickup truck with a white camper shell. At the time he also owned five guns, including a Ruger .357-magnum. Appellant denied killing either Cynthia or James Bell, threatening to do so, or talking with anyone about having done so.

Appellant testified that he began selling drugs to support his own methamphetamine habit after he was fired from his truck driving job in September 1992. He was not very successful at it, and was "slowly losing ground." Appellant met Cynthia Bell because she was a friend of his girlfriend, Ringler. He would "front" one-sixteenth of an ounce of methamphetamine to Cynthia, who would in turn "cut" the drug, divide it into smaller parcels, and then pay him back after selling it herself. Although Cynthia was in debt to appellant for as much as $700, appellant claimed she would always pay him back. Just before she was murdered, Cynthia owed him between $150 and $170. Appellant claimed that he never threatened Cynthia about the money she owed him.

Appellant described the incident on October 23, 1992, in which Cynthia Bell "entered my house without asking, or broke into the house, however you want to say it." He claimed that he did not get angry at Cynthia; instead, he was "more amused" by the incident. After Cynthia found him in his bedroom, he "fronted" her a quantity of methamphetamine, injected her with some of the drug, and then socialized with her and James Bell. He claimed that after that, everything "was fine" between them.

Appellant had known Murphy from going to school with her between 1966 and 1979. He started selling drugs to her in October 1992. Murphy introduced appellant to Bernal about one week before October 26. Through Bernal, appellant also became reacquainted with Daryl Borelli, whom appellant had known in high school. Bernal served as a conduit for drug purchases by appellant from Borelli. On October 25, Borelli brought two ounces of methamphetamine to appellant's house. They had never dealt personally with each other before. Later that night, Borelli came over to appellant's house again. They talked in appellant's bedroom about the "games" Bernal was playing, and decided that from then on Bernal would not serve as a "middleman" for them. According to appellant, Borelli told him that as long as he had Murphy and Cynthia in his business, he "was going to have problems," and Cynthia "shouldn't even be able to breathe the air that we do." Appellant denied saying anything negative about Cynthia to Borelli or twirling a gun around in his presence.

Appellant acknowledged driving Murphy out into the country on October 24, 1992. He claimed he was merely taking the "rural route" to Davis. According to appellant, Murphy was "hysterical," so he simply let her talk for a while. Then he began to question her about a tape recording he had heard of a suspicious conversation between Murphy and Bernal. Appellant denied threatening to kill Murphy at any time or pointing a gun at her. According to appellant, he simply "decided to play a little game," and shot his gun out of the truck window twice. Appellant next saw Murphy on the morning of October 26, when, according to him, she called to ask him to pick her up at a friend's apartment in Davis. When he arrived, he became irritated because no one was there. He

kicked the door, and it "flew open." He then went in and sat on a couch, thinking "somebody would show up sooner or later." When Murphy arrived, appellant left a note apologizing for the damage to the door.

Appellant asked Murphy to contact Ruiz because he wanted to ask her advice about how to get along with heavy methamphetamine users. He denied making any threats against the Bells or anyone else while talking with Ruiz. He "could have said something" to the effect that he felt "like just blowing them away," but he was only "laughing and joking," and not directing the comment "toward any one person." Appellant decided he "didn't want to deal in drugs anymore," because he "didn't want to put up with the games that were being played," and was planning on "cutting everybody loose," including Cynthia. He did not want to talk to Cynthia or have anything to do with her, although she would continue to be welcome in his house because of her friendship with Ringler. Appellant denied making any arrangements with Cynthia to meet her at the intersection of Interstate 505 and VacaValley, or anywhere else that day.

Sparks arrived at appellant's house with "another kid" whom appellant did not know between 5:30 and 6:00 p.m. on October 26, 1992, and tried to sell appellant a .38 special. Appellant did not buy it because it was damaged. According to appellant, Sparks said he had some money and was looking for an ounce of methamphetamine. Because he did not want to deal in his house, appellant told Sparks to wait in a nearby park while appellant tried to find some drugs. Appellant and Bernal left in appellant's pickup truck at the same time Sparks left. When Sparks proceeded onto the freeway instead of toward the park, appellant followed close behind and blinked his headlights. They pulled over, and agreed that Sparks would come with appellant to look for methamphetamine while Bernal went with Gibeau and then met them at a gas station in an hour. Once appellant found some methamphetamine, however, Sparks was no longer interested in buying it and instead asked appellant to take him to Vacaville. Appellant declined, saying he would take Sparks to the agreed rendezvous. According to appellant, Sparks "was so spun, he couldn't talk." After driving around for awhile looking for someone to purchase Sparks'

gun, appellant stopped at the gas station and got out to telephone Ringler, leaving his own .357 gun on or under the seat. When appellant returned to the truck, Sparks was gone. Appellant did not see Sparks leave; he assumed Bernal had picked him up. Appellant did not check to see if his gun was still in the truck.

Appellant testified that after Sparks left, Bernal and Gibeau arrived and talked with him for about 20 minutes before leaving. John Peterskoff and Manuel Michel, two of appellant's former trucking acquaintances, also pulled up at the gas station. After drinking beers and socializing with them for at least an hour, appellant telephoned Ringler at approximately 7:00 p.m. Thereafter, he "shot up," and drove home "very slowly." When he got home, he "pulled into the driveway and sat there for a while," "trying to maintain control" and "get a focus." After Mathies, Nissen and Ringler asked him if he "was going to come inside or just sit out there all night," he came inside with his briefcase and his shirt on. Because appellant "was pretty spun" on drugs at that point he "didn't even think about" his gun, even though it was his normal custom always to retrieve his gun from the truck and bring it into the house with him in the briefcase or some other holder. Appellant went upstairs, put down his briefcase, and went into the bathroom. He denied changing his clothes or having any blood on him. A few minutes later, someone came to the bedroom and informed appellant that Michel was there to see him. Michel stayed for about an hour talking with appellant and taking drugs. Between 10:00 and 10:30 p.m., in response to two telephone calls, appellant went to the nearby Chevron station to supply Pete and Shannon Joy with methamphetamine. After about 20 minutes, appellant came home and went to sleep.

The next morning, appellant asked Nissen to help him take the camper shell off of his pickup truck because he wanted to save gas mileage. He denied telling Nissen he did not want anyone to recognize the truck, or saying anything to Nissen about the victims. Appellant claimed to have asked Nissen to take his gun from his briefcase, and to put it behind the seat of the truck. According to appellant, his "last clear recollection" of the gun was seeing in on the seat of his truck while he was talking with Sparks. He assumed

the gun was in his briefcase because it was his usual habit to put it in the briefcase when he got out of the truck and went into the house. Appellant conceded that his usual custom was to have a trigger lock on the gun, and that it would have to be removed for the gun to be used.[5] Appellant also admitted he lied to the police when asked when he had last seen his .357. Appellant denied asking Turner to get rid of his gun.[6]

Appellant denied telling Carter that he killed the Bells. According to appellant, Carter asked him whether he killed someone in Yolo County and whether he "did the two in Vacaville." After "playing with [Carter's] mind" and "having fun" with him a bit, appellant told him "No, but they sure think I did." Appellant claimed he fled from the police when they tried to arrest him because he "had no intentions on going to prison for three counts of murder that I didn't do."

Appellant denied confessing to Jacobitz or giving him any information about the Bells' murder. According to appellant, Jacobitz was a known "liar"; appellant was suspicious of him because he asked too many questions about appellant's case and wanted to read all of appellant's newspaper clippings. Appellant let Jacobitz read some newspaper clippings, which Jacobitz kept for several days. However, appellant would not let Jacobitz read the police report because he mistrusted him. Appellant thought Jacobitz may have heard him talk with other inmates about how witnesses had testified at his earlier trials. Appellant testified that while in the county jail law library, Jacobitz offered to help him by having Edgar killed. Appellant rejected the offer, saying he just wanted Edgar "to tell the truth," i.e., that Edgar "had been threatened" by the police to give testimony against appellant. On cross-examination, appellant admitted that he gave

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[5] On October 28, 1992, the police found a trigger lock in a gym bag on the passenger floorboard of appellant's pickup truck.

[6] Appellant testified he did not know Turner, and was introduced to him the first time when Turner came with Ringler to pick him up at the police station. According to appellant, he did not ask Turner to "get rid" of his gun because "I didn't even know Mike Turner. I wouldn't ask somebody I didn't know to do something like that."

Edgar's address to Jacobitz. According to appellant, he "didn't think [there] was any harm" in doing so even though Jacobitz claimed to be a member of the Aryan Brotherhood and had offered to have Edgar "done in," because Jacobitz was "a liar."[7]

TIME OF DEATH EVIDENCE

Appellant offered markedly conflicting testimony from several witnesses in an attempt to establish that the murders could not have occurred during the time frame established by the prosecution witnesses. Russell Carter, a truck driver from Missouri, testified that when he drove by the scene of the murders between 6:10 and 6:45 a.m. on October 27, he saw several people and at least *five* vehicles: an old two-tone brown Ford van, a dark brown 1975-1977 Oldsmobile Cutlass, a beat-up old Volkswagen, a 1981-1982 silver Cadillac, and a Camaro. Carter saw a woman in the driver's seat of the Camaro; an approximately 40-year-old man with a light blue T-shirt standing next to the Ford van; a gray-haired man in the driver's seat of the Cadillac with a woman with long gray hair in the passenger seat; another person in the Oldsmobile; and yet another man walking toward the Camaro with a small pistol in his hand. This man had light brown shoulder-length hair, was five feet seven to eight inches in height and about one hundred

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[7] In support of his testimony in this regard, appellant offered the testimony of two other county jail inmates (James Stevenson and Brett Swafford) that Jacobitz was in the vicinity when appellant talked about what had happened at his previous trials. According to these inmates, appellant only talked about what the witnesses said, and did not discuss what he himself actually did or did not do. The inmates testified that Jacobitz read the Vacaville newspaper, and was interested in newspaper clippings about appellant's case which he obtained either from appellant directly or through one of the inmates to whom appellant had loaned them. Swafford testified that appellant expressed concern about Jacobitz, saying he did not trust him, and volunteered that he was "going to have some fun with the guy." Swafford was impeached with prior felony convictions, and admitted that appellant was a "good acquaintance" of his in the jail.

In addition, Charles Millard testified that he visited appellant in county jail as a favor to appellant's mother. According to Millard, about one week before trial appellant told Millard he was concerned that Jacobitz was a "snitch" because he persisted in asking about appellant's trial.

forty pounds in weight, and was wearing a T-shirt, jeans and a baseball cap. When he reached the Camaro, the man shot the woman in the head, causing blood to splatter all over the windshield. Meanwhile, the man standing next to the van was talking into a portable scanner or telephone. Carter called 911 on his CB radio, drove to the business to which he was making a delivery, and called 911 a second time. Although Carter had never seen appellant before, he was sure appellant was not the man he saw shoot the woman because the shooter had a full head of hair. On cross-examination, Carter conceded he was some "distance" away from the scene; because he had "to watch the road" as he drove his tractor-trailer by, he could not "see all of it."

Still other defense witnesses gave contradictory and inconsistent evidence about what they saw and the times that they saw it as they drove by the scene of the murders. Charles Anderson testified that when he drove by the murder scene at approximately 8:15 p.m. on October 26, 1992, he saw an older Camaro or Firebird together with a light green mid-70's Ford pickup with a lumber rack and no camper shell. Robert Tavares testified he saw a white Camaro and a blue 1970's Chevrolet pickup parked side by side approximately one hour later. According to Tavares, a "very skinny," 6-foot-tall 20 or 30-year-old white male with dirty blond shoulder-length hair got out of the passenger side of the car. Tavares did not see anyone else around, and could not tell if the windows of the Camaro were open. In direct contradiction to Tavares's testimony, Scott Schriefer testified that he did not see *any* vehicles in the area when he drove by the murder scene at approximately 9:15 p.m. Lisa Peer saw an older white Camaro and a newer red Camaro racing up Interstate 505 sometime during the night of October 26. At approximately 12:08 a.m., Peer saw the same two cars parked at the scene of the murders. A very petite, 5-foot-4-inch woman with short brown hair was apparently arguing with a man about five feet eight to nine inches with "new-fangled" spiky hair, who towered over her. When Linda Daraskavich drove by the same scene about 3:05 a.m., she saw the Camaro and an older model, dark-colored pickup truck. A tall, thin man, six feet to six-foot three inches

in height and wearing a dark-colored baseball cap, was walking from the car to the truck. Daraskavich could not tell if the windows of the Camaro were rolled up or down.

THIRD PARTY CULPABILITY EVIDENCE

Through the testimony of several witnesses, appellant tried to establish that one or more of several other individuals was the actual perpetrator of the murders in this case. The defense theory was that these persons were acting on behalf of Daryl Borelli, another local methamphetamine dealer to whom Cynthia Bell owed money.

BORELLI

Called as a hostile witness by the defense, Borelli himself testified that he and appellant had been acquainted from school, but were never friends. Borelli was employed as a custodian at the University of California in Davis; he denied selling drugs in 1992 or that Bernal worked for him as a middleman, and claimed that no one owed him any money in 1992. Borelli had known Michael Walker, the man who rented the space where appellant's gun was found, for eight years. Borelli denied having anything to do either with the Bells' murder, or with the disappearance of appellant's gun.

According to Borelli, the first contact he had with appellant since grade school occurred when appellant called his house in October 1992, told Borelli's wife that Bernal and Murphy were trying to "rip him off," and asked Borelli to come over to appellant's house immediately if he wanted to see Bernal alive again. Borelli went to appellant's house and met with appellant and Bernal in appellant's bedroom. Appellant was heavily under the influence of drugs; he accused Cynthia Bell of trying to steal his drugs and owing him $600, and talked about blowing her head off. While doing so, appellant was twirling a cocked .357-magnum around his finger and playing a tape of a telephone conversation between Bernal and Murphy. Borelli acknowledged that he did not immediately tell the police about appellant's threats against Cynthia Bell, explaining that he did not want to get involved. He told the entire story only after he heard that appellant was accusing him of the murders.

Debra Lyn Neundorf testified via transcript from a previous trial. She had been friends with Cynthia Bell for 15 years and had dated Borelli for 2 years, although not in October 1992. Neundorf testified that Borelli never told her he was present when the Bells were shot, and she never heard him agree to meet Cynthia on Interstate 505. She denied ever selling drugs to Cynthia on Borelli's behalf; hearing Borelli threaten to kill Cynthia; hearing Borelli say that Cynthia owed him money; or ever telling anyone that Borelli was responsible for the Bells' murders or had said he was, or that she herself was a witness to the killings. Neundorf admitted that in September or October 1992, Borelli commented that Cynthia Bell "shouldn't be allowed to even breathe the air." However, she did not believe this to be a threat. According to Neundorf: "Daryl thought that about a lot of people. It was a way to keep me home and not find out . . . what he was doing out and about." Neundorf never saw Borelli in a red Camaro or with a .357-magnum handgun. She denied she ever told defense investigator McClellan that Borelli told her "he had a gun that was used in the homicides of the Bells" which "he got rid of." Neundorf also denied Borelli had ever threatened her, or that she was afraid of him. On cross-examination by the People, Neundorf testified that when she was interviewed by defense investigator McClellan and the defense attorney, they tried to tell her things that she knew not to be true, without tape recording the interview or providing her with any report for her to review.

To contradict Borelli and Neundorf, the defense offered the testimony of several witnesses who claimed Neundorf had previously indicated that someone other than appellant had committed the murders. George McCleese testified that Neundorf told him she had witnessed the homicides, and appellant "wasn't the one that did it"; instead, she said they were committed by "[h]er boyfriend," without identifying him directly. Neundorf drove a green Ford pickup truck. McCleese talked with Anthony Hurtz about appellant when the two were in custody together in March 1993. According to McCleese, Hurtz told him appellant would not be convicted because appellant did not commit the murders, and the gun used in the killings was hidden in a storage shed on Leisure Town

Road. McCleese did not recall whether Hurtz said he was involved. He also testified he did not believe Hurtz, because of Hurtz's own reputation as a "loud talker" who liked to "make himself look big." McCleese was impeached with several felony convictions for burglary and receiving stolen property. He admitted he had previously testified that Neundorf did not tell him anything about witnessing the murders or her boyfriend committing the crimes.

To support McCleese's testimony and impeach Neundorf, appellant offered the double hearsay testimony of McCleese's mother, Helen Dixon, to the effect that the boyfriend of Dixon's daughter told Dixon that Neundorf had said she knew it was not appellant "that did the killing" because she (Neundorf) was there at the time. Dixon was not told who did commit the "killing," or even what murder(s) were being discussed. Appellant also offered the testimony of Diane McClure, a legal secretary, that while present at an interview of Matthew Cordell she heard Cordell state he had sold large amounts of methamphetamine to Borelli; he had witnessed drug transactions between Borelli and Cynthia Bell; and he had heard Borelli express anger against Cynthia because she had "burned" him, as Borelli rolled some bullets back and forth in his hand. When on the stand, Cordell himself denied making any of these statements. Cordell did testify he heard Sparks say he had been dropped off at the "country Oates store" while the victims "were being done."

HURTZ

Aside from this testimony purportedly linking Borelli to the murders, the defense offered evidence of the possible involvement of Anthony Hurtz. Hurtz himself testified that in October 1992 he made "[t]he majority" of his money in construction, doing "concrete work." He denied making money selling drugs; ever selling drugs to Cynthia Bell; or even knowing the victims, appellant, or any of the other principal individuals in this case. He denied any involvement in the Bells' murder or telling anyone he had been involved, and claimed he was at home with his girlfriend in Sacramento all night on October 26, 1992. He also denied possession of a .357 revolver in October 1992. He

admitted he had been convicted of at least one felony, and that he use to go "by the name of Leroy or Uncle Leroy."

To contradict and impeach Hurtz, appellant offered the testimony of several witnesses linking Hurtz to the murders. Hurtz's former girlfriend Chantelle Eittreim testified via transcript that she was living with Hurtz in late 1992, at which time he was heavily involved in drug trafficking, selling four to five pounds of methamphetamine every other day. At the time, he owned both .357-magnum and .38-caliber handguns. According to Eittreim, after receiving a page sometime after 10:00 p.m. on October 26, he told her he had to go to Dixon to meet "Ryan" because " '[s]ome bitch burned one of my friends, and I have to go take care of it.' " Eittreim accompanied Hurtz to Dixon where Hurtz met with Bernal in a restaurant for about 20 minutes while Eittreim remained outside. After Hurtz took her home, he left again and did not return until the next morning. Eittreim tried to page him several times during the night, but he did not respond. In December 1992, Hurtz told her the police were looking for him because they wanted to question him about the murders. He told her he had attended the meeting at which the killings were planned, and was also there when the victims were murdered. According to Eittreim, Hurtz told her "that [Cynthia] took it like a man," while "James was on the floorboard with his hands over his head begging not to be shot." After October 26, Hurtz changed the outer appearance of his automobile and started acting "paranoid." On cross-examination, Eittreim could not state Hurtz's pager number, conceded she did not like Hurtz, and admitted she was addicted to methamphetamine in October 1992.

Both of Eittreim's parents testified for the defense. Candida Eittreim testified that at first, Hurtz told her he had committed the murders of the Bells. Then he changed his story to having been involved in the murders. Finally, he told her he had only helped plan the killings and was there when they were committed. He asked for her help in getting an attorney, and her husband hired one for him. Later he threatened to kill her and her family if she testified in this matter. On cross-examination, Mrs. Eittreim admitted she

did not contact the police "right away" after Hurtz's alleged confession because she did not believe him; and when she was later contacted by the police, she "misled" and lied to them. Mr. Eittreim testified that in January 1993, Hurtz asked him to pick up a .357 revolver from a storage unit off Leisure Town Road in Vacaville. As soon as he did so, Mr. Eittreim turned it over to the police.

Kenneth Keith, yet another admitted methamphetamine abuser, testified he was rooming with Eittreim and Hurtz in October 1992. Keith did not think Hurtz came home on the night of October 26, although he had only "vague" recollection of that date and was using drugs at the time. According to Keith, in January or February 1993, Hurtz told him he knew Cynthia and did not like her because "[s]he had a big mouth and she talked a lot." Hurtz also told Keith he had seen the Bells on "[t]he night that it happened," and he knew who killed them but "he wasn't going to tell."

Harmina Ross, another former girlfriend of Hurtz and the mother of his child, testified he had begun dealing drugs in 1992. Although she tried paging him several times on October 26, he did not respond. In December 1992, Hurtz told her he had shot two people at close range while they were sitting in a Camaro in a vacant lot in Vacaville; the second person killed had begged not to be shot and "tried to get away." Later, Hurtz changed his story and told her he was only a suspect and was not responsible for the murders. Ross acknowledged that she did not come forward with Hurtz's confession until she was contacted by a defense investigator. When Ross subsequently spoke with the police, she did not mention Hurtz's confession.

Eliane West was a friend and neighbor of Hurtz in October 1992. She testified that Hurtz told her he was present at the planning of the murder of the two people in the white car out in the area of the Nut Tree. She did not relay this information to the police. According to West, Hurtz sent her a letter threatening that if she "said anything to anybody about him being there when they were planning it, that they would never ever find [West]. He would guarantee it." West was unable to produce the letter, claiming it

was stolen from her apartment. She did not remember the date on the letter or how many pages it was. She also testified that Hurtz had sent her two friendly notes from jail.

BERNAL

Finally, the defense also attempted to link Ryan Bernal to the murders through the testimony of several additional witnesses. Bernal himself did not testify because of his pending prosecution for the murder of Gibeau and his consequent invocation of the Fifth Amendment. The testimony of other defense witnesses was introduced to establish that Bernal had known Borelli for approximately 15 years and sold methamphetamine on his behalf. About one week before the date of the murders on October 26, 1992, Murphy introduced Bernal to appellant.

Ryan Vergos, who testified through transcript, lived with Bernal and his family in a mobile home on the property of his uncle George Santos. Bernal owned a faded black baseball-type cap. Vergos did not know appellant, and did not see appellant with Bernal on October 26. That evening, Bernal left in a small truck sometime between 8:30 and 9:00 p.m. Bernal did not come home until the next morning between 7:30 and 9 a.m. Bernal told Vergos that his uncle "helped him" with some killings in Vacaville. Several days later, Bernal told Vergos that it was actually appellant who had killed the Bells. Vergos testified that Bernal was a liar, and was very afraid of Borelli, for whom he sold methamphetamine. Cynthia Bell had purchased methamphetamine from Borelli regularly, and Vergos heard Borelli say she owed him money. A week before the murders, Borelli was furious because he needed $1,500 that Cynthia owed him, and "he wanted her taken care of."

Cordell told a defense investigator that Nissen said he had lied about appellant's involvement in the murders in order to protect Bernal. Nissen described Bernal as his "best friend," whom he had met through another drug client of appellant named Jason Kraak. Kraak in turn testified that Nissen had a "very bad reputation" for "making up stories, lying," and untruthfulness. Although Nissen never told Kraak he was going to lie or had lied in his testimony about appellant's involvement in the killings, he did say that

he, Murphy and Bernal had decided they were "going to put it off on" appellant. This was because Bernal "was young and had his whole life ahead of him," and because the police had played them a tape recording in which appellant threatened to kill Nissen.

On cross-examination, Kraak conceded that Nissen never said he was going to lie about appellant and the murders, and Kraak did not know whether or not Nissen's statement about "putting it off" on appellant was the truth. Kraak testified that a few days after the homicides, appellant told him that Cynthia Bell "was found with her head blown off from the jaw up." Appellant told Kraak that the police had shown him photographs of the victims when he was arrested; he asked Kraak if he had "ever seen what a .357 wadcutter does to a person." Appellant never told Kraak that he had killed the Bells, and Kraak never saw appellant with a gun.

REBUTTAL AND SURREBUTTAL

In rebuttal, the prosecution offered evidence Harmina Ross told the police that Hurtz had told her he was a suspect in the victims' murders but was not responsible for their deaths, and "he gave her reasons why." Ross never gave the police any information that Hurtz had confessed to the murders himself.

Officer Robert Lee testified that on November 2, 1992, Ringler's daughter Cynthia C. told him appellant carried his handgun wherever he went, and she had last seen him with it at approximately 6:00 p.m. on October 27, 1992. He was carrying it in a brown-colored, soft handgun case. According to Officer Lee, Cynthia C. had never mentioned appellant carrying a briefcase.

Finally, the prosecution offered evidence that in his initial contacts with the police, truck driver Russell Carter told the police that he had stopped his truck at the scene of the crime at approximately 6:50 a.m. on October 26, 1992, and approached the victims' car, at which point he observed that someone had been shot. Carter did not report that he actually saw the shootings take place, and did not mention the presence of any people other than the victims at the scene. Aside from reporting that he observed one "mid-sized, four-door Oldsmobile" leaving the area, Carter did not mention any other vehicles

in the area. Carter also told the police he thought the shootings must have been done by means of a rifle. The police did not follow up on Carter's report because it was totally inconsistent with the physical evidence at the scene, the fact the killings had been committed with a handgun, and the actual condition of the victims' bodies when found around the same time Carter claimed to have seen them.

In surrebuttal, the defense offered the testimony of an employee of the business to which Carter made a delivery at approximately 7:00 a.m. on October 27, 1992. He described Carter as looking "like he saw a ghost, . . . very distraught, very upset." Carter told him he had seen someone standing next to a car holding a gun pointed in the window, who then got into a brown car and drive away.

PROCEDURAL BACKGROUND

Appellant was charged in February 1993 with three counts of first degree murder of three victims (James Bell, Cynthia Bell, and Jason Gibeau), with allegations of the special circumstance of multiple murder and of firearm use. (Pen. Code, §§ 187; 190.2, subd. (a)(3); 12022.5.)[8] In May 1993, appellant's section 995 motion to set aside the information was granted with respect to the charged murder of Gibeau.

Appellant's first two trials resulted in mistrials due to juror deadlock. Appellant's third jury trial commenced on February 24, 1995. On June 8, 1995, the jury convicted appellant of first degree murder on both counts, and found true the allegations of firearm use and multiple murder special circumstances. He was sentenced to life in prison without the possibility of parole, plus a term of 35 years. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE TO CONVICT

Appellant's principal contention is that there was insufficient evidence to support the jury's verdict that he murdered Cynthia and James Bell. Based on our exhaustive

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[8] Unless otherwise indicated, all further statutory references are to the Penal Code.

review of the lengthy record, we conclude there was ample evidence to support the conclusion that appellant was guilty as charged.

STANDARD OF REVIEW

When the sufficiency of the evidence to convict is challenged on appeal, the critical inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, original italics; see also *People v. Berryman* (1993) 6 Cal.4th 1048, 1083, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) An appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson, supra,* 26 Cal.3d at p. 578.)

In reviewing the evidence adduced at trial, our perspective must favor the judgment. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Barnes* (1986) 42 Cal.3d 284, 303-304; *People v. Matian* (1995) 35 Cal.App.4th 480, 483-484.) "This court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.] [¶] Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) The standard stated by California cases is entirely consistent with the controlling federal law.

(*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319; *In re Winship* (1970) 397 U.S. 358, 362.)

There is no question that the prosecutor's burden is a heavy one. "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence." (*People v. Hall* (1964) 62 Cal.2d 104, 112.) Nevertheless, even though "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction" (*Redmond, supra,* 71 Cal.2d at p. 755), this court is bound by the findings of the trier of fact where, by its verdict, it has rejected an hypothesis pointing to innocence and there is evidence to support its implied finding that guilt is the more reasonable of the two hypotheses. Moreover, we must be ever mindful of the fact that it is the exclusive province of the trier of fact to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (*Barnes, supra,* 42 Cal.3d at p. 303.) "Thus, even though the appellate court may itself believe that the circumstantial evidence might be reasonably reconciled with the defendant's innocence, this alone does not warrant interference with the determination of the trier of fact. [Citations.] Whether the evidence presented at trial is direct or circumstantial, . . . the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Towler* (1982) 31 Cal.3d 105, 118, original italics.)

SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICTS

Appellant argues that the prosecution's evidence of his guilt is undermined by his competing evidence (a)suggesting the victims were murdered after 10:30 p.m. on October 26, 1992, the time at which the prosecution witnesses testified that appellant returned home; (b) attacking the credibility of the prosecution witnesses; and (c) raising the possibility of third-party culpability involving Borelli, Hurtz and Bernal. This argument simply asks this court to reweigh the evidence and make different determinations of

credibility than those already made by the trier of fact. This we may not do. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

There was ample evidence to support of the jury's verdicts. Numerous witnesses testified that Cynthia Bell owed appellant money for drug transactions, and he had recently been deeply angered when he caught Cynthia sneaking into his house unannounced and entering his bedroom, evidently with the intent to steal from him. At least three witnesses—Murphy, Ruiz and Mathies—testified that appellant had threatened to kill Cynthia Bell during the few days immediately preceding the murders. Several witnesses, including his own brother, testified that when appellant returned home after 10:30 p.m. on the night of the murders, he was spotted with blood. His handgun also had blood on it, and contained four spent shells. He made incriminating statements to his brother and several other witnesses, saying he "did" Cynthia and James Bell and describing the impact of a .357-magnum bullet on a human head. Appellant's gun was found in a location tied to appellant and his girlfriend, and expert testimony established that one of the bullets recovered from the victims had definitely been fired from appellant's gun. Appellant fled from police in a high-speed chase when they attempted to take him into custody. Finally, he confessed his crime to a fellow inmate, tried to arrange to have his brother Edgar and his family injured in order to coerce Edgar to change his testimony, and even wrote down his brother's name and address to give to the other inmate.

Appellant's evidence does not undermine the substantiality of the prosecution case. His own testimony about his activities and whereabouts on the night of the murder was extraordinarily vague, particularly with regard to the critical time period between 7:00 and 10:30 p.m. Many details of appellant's testimony were actually in conflict with the testimony of other defense witnesses.[9] The physical evidence of the victims' bodies,

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[9] For example, Michel testified he was the first person appellant saw when the latter returned home the night of October 26, and they immediately went upstairs together.

found in a state of full rigor mortis as of approximately 11:00 a.m. on October 27, was consistent with placing the time of the murders around 10:00 p.m. the night before. On the other hand, the physical condition of the bodies was completely inconsistent with appellant's reliance on the testimony of truck driver Russell Carter, who claimed to see the murders take place at 6:50 a.m. on October 27, or just before the arrival of the police at 7:00 a.m., by which time the bodies were already stiff, cold and ashen.[10] The fact the victims' Camaro had its ignition in the "on" position with an empty gas tank and obvious carbon buildup below the exhaust pipe clearly indicated the car had been idling there for a lengthy period of time. In short, appellant's theory that the victims had been shot only minutes before the police arrived was unbelievable and completely contrary to all the other evidence in the case.[11]

Appellant's evidence of the purported third party culpability of Borelli, Hurtz and Bernal was both contradictory and weak. Other than alleged "confessions" by these individuals to others, there was no physical evidence linking them to the crime, and no witnesses to their activities on the night of the murders. Moreover, the supposed "confessions" were themselves ambiguous and self-contradictory. The witnesses who

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Appellant, in contrast, testified he went upstairs as soon as he came home that night; only later did someone come up to his bedroom to tell him Michel was there to see him.

[10] Needless to say, truck driver Carter's alleged observation of the murders at 6:50 a.m. is also inconsistent with the earlier discovery of the bodies sometime between 6:15 and 6:30 a.m. by William Patterson, the man who first called 911 and reported the murders to the police. Carter also gave the police several inconsistent versions of the event, including that he had not seen the actual murder and speculated that it had been committed with a rifle.

[11] Appellant actually offered a wide variety of possible times the victims could have been shot, based on the testimony of all the various defense witnesses who made ambiguous sightings of something suspicious taking place at the location of the murders at different times of the night and morning of October 26 and 27. Appellant's own contradictory evidence, obviously offered in the hope of raising some "reasonable doubt" in the minds of the jurors, was insufficiently substantial to offset the substantial evidence of appellant's guilt.

testified to these confessions themselves lacked credibility, either because they had personal motives rendering them hostile to the alleged suspects or biased in favor of appellant; or because of their own failure to give timely, truthful information to the police. In light of the prosecution evidence of appellant's threats against the victims prior to the murders, his bloody clothing and gun on the night of the killings, his admissions to several witnesses, the discovery of appellant's gun and its establishment as the murder weapon, and appellant's high-speed flight from the police, the jury was not required to accept this flimsy defense evidence.

Finally, appellant's attack on the credibility of the prosecution's witnesses does not render insufficient the evidence of appellant's guilt. These arguments were made by defense counsel at trial, and were rejected by the jury. It was exclusively for the jury, as the ultimate arbiter and finder of fact, to assess and adjudge the credibility of all the witnesses, both prosecution and defense. In the absence of clear evidence that the jury's determination of credibility was egregiously arbitrary, capricious and irrational, we will not disturb that determination. (*Barnes, supra,* 42 Cal.3d at p. 303; *Towler, supra,* 31 Cal.3d at p. 118.)

III. PROPRIETY OF CONTINUED JURY DELIBERATIONS

Appellant contends the trial court erred in responding to the jury foreperson's report that the jury was deadlocked by determining that additional deliberations would be appropriate. Appellant is wrong; there was no abuse of the trial court's discretion.

PROCEDURAL BACKGROUND

On May 16, 1995, after 11 days of deliberations, the jury sent the trial court a note from the foreperson stating that she believed "we are deadlocked at this point," and asking the trial court: "Do you have any suggestions for us regarding what we might do to break the deadlock?" The trial court called the jury into the courtroom and asked the foreperson whether (a) if the jury continued in its deliberations, the foreperson thought there was a reasonable possibility that the jury might arrive at a verdict; and (b) whether there was anything further the trial court could do to assist the jury in arriving at a verdict.

The foreperson responded that the jurors were "just looking for . . . anything that the Court might suggest that we could try to do to break the deadlock." The trial court inquired how the jury was split, and was told that after four votes, the jury was split seven to five.

The trial court admonished the jurors that each party had a right to the jurors' own individual opinions; "everybody is entitled to their own opinion as a juror"; the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations; "until you are convinced that you are wrong, then you should stick to your vote"; "if a verdict can be reached, then we want a verdict to be reached"; and "[i]f a verdict can't be reached, then that's just the way it is." The trial court then polled the jury to determine whether they individually believed further deliberations would be useful. Seven jurors agreed with the foreperson that their deliberations "hopelessly deadlocked"; one "[h]esitantly" agreed; one was undecided; and two disagreed. On the basis of this poll, the trial court sent the jurors back to deliberate further, again instructing "that if you are convinced that you are wrong, then you should change, [but] if you are not convinced, . . . you should stick with you own vote . . . ." The trial court told the jurors it would check with them the next day "as to what, if any, progress" had been made, "and if not, then we can go from there again."

At that point, the foreperson asked for further clarification of the concept of reasonable doubt. The trial court told the foreperson to reread the instruction, and added that "it's really you, as individual jurors, when you read that instruction, to apply it and then give it the meaning to which you feel it's entitled." Thereafter, the jury deliberated for two days without communicating with the court. On May 19, the jury requested a readback of some portions of trial testimony, and informed the court it had selected a new foreperson. On May 22, the trial court suggested making an inquiry about whether the jurors felt they were making progress, but the prosecutor objected on the ground that "[t]hey're obviously working," and "if they haven't brought the subject matter up with the

Court, we shouldn't be bringing that up." The jury was brought in, and the new foreperson indicated the jury's willingness to continue deliberations the next day.

On June 1, the trial court sua sponte asked the jury to come into the courtroom to inquire whether there had been any progress in the deliberations. At that time, the new foreperson stated: "Yes, there has been some change." The trial court reread CALJIC No. 17.40 instructing the jury that both sides were entitled to the individual opinion of each juror; each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; and although each juror was not to hesitate to change an opinion if convinced it was wrong, he or she was not to decide any question in a particular way just because a majority of the jurors, or any of them, might favor such a decision. Upon seeing "all affirmative nods" from the jurors in response to its question whether further deliberation would be helpful, the trial court sent them back to deliberate. On June 8, the jury returned verdicts of guilty on both counts.

APPLICABLE LAW

Under Penal Code section 1140, "[e]xcept as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." Generally, "[t]he determination whether there is reasonable probability of [jury] agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [Citation.]" (*People v. Breaux* (1991) 1 Cal.4th 281, 319; see *People v. Pride* (1992) 3 Cal.4th 195, 265; *People v. Rodriguez* (1986) 42 Cal.3d 730, 775.)

The issue of coercion is necessarily dependent on the facts and circumstances of each case. (*People v. Sandoval* (1992) 4 Cal.4th 155, 195.) On the one hand, coercion has been found where a trial court, by insisting on further deliberations, expresses an

opinion that a verdict should be reached. (*People v. Crossland* (1960) 182 Cal.App.2d 117, 119; *People v. Crowley* (1950) 101 Cal.App.2d 71, 75.) On the other hand, a trial court's refusal to discharge a jury in the face of the jury's repeated reports of impasse does not necessarily amount to an implied suggestion to the jury that a verdict should be reached. (*Rodriguez, supra,* 42 Cal.3d at p. 775.)

Thus, it is neither an abuse of discretion nor inherently coercive for a trial court to inquire into the numerical division of the jury in an attempt to determine whether there is any reasonable probability of agreement, or to ask for a resumption of deliberations after ascertaining the breakdown in juror voting. (*Breaux, supra,* 1 Cal.4th at p. 319; *People v. Sheldon* (1989) 48 Cal.3d 935, 958-960; *Rodriguez, supra,* 42 Cal.3d at pp. 775-776, fn. 14; *People v. Carter* (1968) 68 Cal.2d 810, 817.) Similarly, it is not necessarily coercive for a trial court to ask a jury to resume deliberations more than once, even after the jury has deliberated for several days and repeated polling shows the jurors are unanimously negative about the prospects for a verdict. (*Breaux, supra,* 1 Cal.4th at p. 319 [jury twice asked to resume deliberations after four days of deliberations despite polling showing all jurors negative on prospect of a verdict; held, no coercion]; *Rodriguez, supra,* 42 Cal.3d at pp. 775-776 [jury asked to resume deliberations after 18 days of deliberation and 4 impasses; held, no coercion].) A trial court does not abuse its discretion or coerce the jury by inquiring into the numerical division of voting and individually polling the jurors in an effort to see if there was anything the court could do to assist the jury in its deliberations to reach a verdict, as long as the court makes no threats or other statements that could be interpreted either as suggesting that a verdict must be reached, or as exerting undue pressure on any individual juror. (*Breaux, supra,* 1 Cal.4th at pp. 319-320; *Carter, supra,* 68 Cal.2d at p. 815; *People v. Thomas* (1991) 231 Cal.App.3d 299, 303; *People v. Duran* (1983) 140 Cal.App.3d 485, 501-502.)

Because a trial court is charged with determining whether there is a reasonable probability of agreement, it may properly determine that further deliberation might be beneficial even if the jurors unanimously express the opposite opinion. Where even a

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single juror expresses the opinion that consensus might be reached if further clarifying instructions are given, it is not an abuse of discretion for the trial court to respond affirmatively to the suggestion. (*People v. Proctor* (1992) 4 Cal.4th 499, 539; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 522; *People v. De La Roi* (1944) 23 Cal.2d 692, 701; *Thomas, supra,* 231 Cal.App.3d at p. 303.) Indeed, because one of the primary duties of the trial court is to help the jury understand the legal principles it is asked to apply, "a court must do more than figuratively throw up its hands and tell the jury it cannot help." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

DISCUSSION: NO COERCION OR ABUSE OF DISCRETION

Appellant asserts that the trial court abused its discretion by requiring further deliberation after the foreperson reported the jury was deadlocked. The assertion is meritless, both on the law and on the facts of the record in this case.

That record clearly shows the trial court did nothing to coerce the jury, and did not abuse its discretion in having the jurors continue their deliberations after inquiring into the numerical division of voting and individually polling the members in an effort to see if there was anything it could do to assist them in their deliberations to reach a verdict. The trial court made no threats or other statements that could be interpreted as exerting undue pressure on any juror; nor did it ever indicate that it was necessary for the jury to reach a verdict. The trial court never expressed an opinion on appellant's guilt or innocence of the charges; nor did it comment on the evidence. Indeed, appellant's assertions notwithstanding, the trial court specifically told the jury they were not required to return a verdict.[12]

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[12] The trial court stated: "If after there's a vote or two votes or three votes or, as in your case, four votes, if you are shown that you are wrong or that the evidence does not support your vote, then you should, as the law says, unhesitatingly change. [¶] But until you are convinced that you are wrong, then you should stick to your vote, and that's what was carefully pointed out by both attorneys, and that's the law that I gave you during the instructions. [¶] So with that, the question then boils down, if you wish further

Thus, the trial court specifically reinstructed that (a) each party had a right to the jurors' own individual opinions and each juror was entitled to his or her own opinion; (b) each juror was to decide the case for him or herself, after discussing the evidence and instructions with the other jurors; (c) although the jurors should "unhesitatingly change" their votes if they were shown to be wrong during deliberations, they should not decide any question in a particular way just because a majority of the jurors, or any one of them, might favor such a decision; (d) "until you are convinced that you are wrong, then you should stick to your vote"; (e) the individual jurors should interpret and apply the instructions themselves; and (f) although a verdict should be reached if possible, "[i]f a verdict can't be reached, then that's just the way it is." The trial court only had the jury continue deliberations after it became apparent that some jurors believed further deliberations would be useful, and that it would be possible to reach a verdict.

On this record, the trial court's actions were clearly not coercive and not an abuse of discretion. (*Breaux, supra,* 1 Cal.4th at pp. 319-320; *Carter, supra,* 68 Cal.2d at p. 815; *Rodriguez, supra,* 42 Cal.3d at pp. 775-776, fn. 14; *Thomas, supra,* 231 Cal.App.3d at p. 303; *Duran, supra,* 140 Cal.App.3d at pp. 501-502.) There was no error.

IV. EDITING OF TESTIMONY READBACKS

Appellant next contends the trial court committed prejudicial error by editing some of the testimony readbacks requested by the jury. Specifically, appellant claims the trial court's editing of some of jailhouse informant Jacobitz's trial testimony at the time of its readback to the jury violated appellant's right to have the jurors apprised of all the evidence in the record. The contention is meritless.

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deliberation, and you have been in deliberation for quite a period of time—and all of you, the Court knows, were very attentive throughout the trial. We went through a long time. . . . But if a verdict can be reached, then we want a verdict to be reached. If a verdict can't be reached, then that's just the way it is. It's not to—because everybody is entitled to their own opinion as a juror."

At issue is the jury's requested readback of a portion of the trial record relating to appellant's jailhouse conversations with Jacobitz. The jury asked for a readback of the testimony of both appellant and Jacobitz on the subject of what appellant told the latter about this case, and their conversation in the jailhouse library. Later, the jury asked to rehear portions of both individuals' testimony concerning "descriptions of blood and skull pieces" and "gun(s)." In consultation with counsel, the trial court edited the transcripts of appellant and Jacobitz for purposes of readback, striking portions regarding conversations between appellant and *other prisoners* because "[t]hat doesn't respond to the question they're talking about." Defense counsel objected and asked the court to read back large portions of cross-examination. However, the trial court concluded that these portions were outside the scope of the jury's request, which was for a readback of testimony on the *conversations between appellant and Jacobitz*.

The trial court was not required to accede to defense counsel's request. It is the jury's right to have testimony reread, not that of the parties or their attorneys. The trial court's obligation is simply to comply with the *jury's* request. (§ 1138; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1020; *People v. Cooks* (1983) 141 Cal.App.3d 224, 261; *People v. Butler* (1975) 47 Cal.App.3d 273, 284.) Here, the material sought to be included by the defense in the readback was clearly outside the scope of the jury's request. The jury did not ask for testimony about conversations between appellant and other prisoners in the jail, or about other places where Jacobitz might have gleaned information about appellant's case. It simply asked for a readback of testimony about what Fry told Jacobitz in their own private conversations. The trial court was under no obligation to have Jacobitz's cross-examination read, or any other portion of the record not encompassed by the jury's specific request. (*People v. Cathey* (1960) 186 Cal.App.2d 217, 222.) The jury did not ask for any further readbacks. We may assume that if the testimony actually read to them did not contain the material they wished to hear, they would have said so. (*People v. Gordon* (1963) 222 Cal.App.2d 687, 689.)

Contrary to appellant's assertion, it is not reasonably probable a result more favorable to himself would have occurred had the redacted portions of the testimony also been reread. Jacobitz's testimony was corroborated by the notes he took during his library conversation with appellant, and the slip of paper given to him by appellant with Edgar Fry's name and address. It is not reasonably probable that rereading appellant's testimony that Jacobitz learned these facts by overhearing appellant's jailhouse conversations with other prisoners—which testimony of course the jury had already heard—would have resulted in appellant's acquittal. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)[13]

V. SANITIZATION OF HURTZ'S CONVICTIONS

Appellant argues the trial court erred by permitting the defense to cross-examine Hurtz about his two prior felony convictions, but disallowing it from eliciting the fact that those convictions were for drug-related offenses. There was no error.

After appellant called Hurtz as a witness, defense counsel questioned him about his sources of income in October 1992. When Hurtz testified that he worked as a construction worker, defense counsel asked the following leading question: "And weren't you, in fact, making your money dealing drugs at that time, Mr. Hurtz?" The trial court sustained objections to this question on grounds of both relevance and the fact it was leading. Under further questioning, Hurtz testified that he made "[t]he majority" of his money from construction, and that he did "[n]ot" have "another source of income at or about the time of October of 1992." When defense counsel then attempted to ask Hurtz if it was true he had been convicted of a particular crime, the trial court interposed and ruled: "My feeling would be you could ask him if he has been convicted of a felony, and I'll allow if he's been convicted of a felony, if that answer is true, but not what felony."

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[13] Appellant failed to request any instruction pursuant to CALJIC No. 3.20 cautioning the jury about the credibility of jailhouse informants, an instruction that need only be given if

Thereafter, defense counsel was only able to elicit Hurtz's admission of at least one felony conviction.

Later, defense counsel objected on the record to the trial court's ruling, arguing that Hurtz had in fact been convicted of two felonies—sale and possession for sale of drugs—and that both felonies were crimes of moral turpitude. The trial court ruled that although appellant could impeach Hurtz's credibility with the fact of his felony convictions, the nature of the crimes of which he was convicted "is of no relevance."

Under California Constitution, article I, section 28, subdivisions (d) and (f), trial courts have broad power to exercise discretion under Evidence Code section 352 (hereinafter referred to as section 352) to permit the use of prior felony convictions for impeachment purposes, so long as the convictions are of crimes involving "moral turpitude." (*People v. Castro* (1985) 38 Cal.3d 301, 306, 312-317.)[14] In addition, trial courts have broad discretion to "sanitize" such prior convictions, in order to reduce a demonstrable potential for unfair prejudice. (*Sandoval, supra,* 4 Cal.4th at pp. 177-178; *People v. Mickle* (1991) 54 Cal.3d 140, 172; *People v. Collins* (1986) 42 Cal.3d 378, 387-389; *People v. Foreman* (1985) 174 Cal.App.3d 175, 179-182.) Thus, a ruling refusing to permit impeachment with a prior conviction is reviewed for abuse of discretion. (Cal. Const., art. I, § 28, subd. (f); *Castro, supra,* 38 Cal.3d at p. 306; *People v. Gordon* (1990) 50 Cal.3d 1223, 1239; *People v. Dewey* (1996) 42 Cal.App.4th 216, 220; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

Under section 352, a trial court may in its discretion exclude material evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice.

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requested by a party. He has therefore waived that issue. (§ 1127a; *People* v. *Daya* (1994) 29 Cal.App.4th 697, 714.)

14 The Supreme Court has defined "moral turpitude" as a "'readiness to do evil,'" or "any character trait which can reasonably be characterized as 'immoral.'" (*Castro, supra,* 38 Cal.3d at pp. 314-317, & fn. 13.)

confusion of the issues, or misleading the jury. The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules. (*Stewart, supra,* 171 Cal.App.3d at p. 65; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) We will not overturn or disturb a trial court's exercise of its discretion under section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Robbins* (1988) 45 Cal.3d 867, 880-881; *People v. Adams* (1980) 101 Cal.App.3d 791, 799; *People v. Cordova* (1979) 97 Cal.App.3d 665, 670.) "The [trial] court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court clearly abused its discretion, e.g., when the prejudicial effect of the evidence clearly outweighed its probative value." (*People v. Brown* (1993) 17 Cal.App.4th 1389, 1396.)

There was no abuse of discretion in this case. The trial court was clearly entitled to make a discretionary determination on the admissibility of Hurtz's prior felony convictions under section 352. As appellant points out, the trial court simply ruled that the nature of the crimes of which Hurtz had been convicted was irrelevant; it did not explicitly base its ruling barring admission of this evidence on a section 352 analysis. However, in stating that the evidence was "irrelevant," the court essentially made a dispositive determination for section 352 purposes, since evidence that is irrelevant cannot be probative, without regard to any question of prejudice. Hurtz's prior felony convictions were relevant to *impeach* his *credibility* as a *witness* only, *not* to prove his prior conduct. (*Castro, supra,* 38 Cal.3d at pp. 306, 312-316, 322-323; *Stewart, supra,* 171 Cal.App.3d at pp. 63-66.) It is patently clear from appellant's defense strategy at trial as well as his arguments on appeal that his purpose was to convince the jury that, given his drug convictions, Hurtz was probably involved in drug trafficking in 1992. Such an inference in beyond the scope of impeachment for credibility purposes. For this reason, the trial court's decision not to permit the admission of this evidence did not exceed the

bounds of reason. (*Sandoval, supra,* 4 Cal.3d at p. 178; *People v. Massey* (1987) 192 Cal.App.3d 819, 825; *Stewart, supra,* 171 Cal.App.3d at p. 65.)

Appellant also urges that the precise nature of Hurtz's prior convictions was admissible to impeach his testimony that his only source of income was his employment as a concrete worker and denying that he sold drugs. In fact, Hurtz testified that he made "most" of his money from construction work; he never actually denied selling drugs. Given the lack of such direct testimony, Hurtz's drug convictions were not relevant to impeach his testimony, and the trial court's discretionary decision sanitizing his testimony was not unreasonable.[15] (*People v. Clair* (1992) 2 Cal.4th 629, 655.)

VI. EXCLUSION OF EVIDENCE OF BORELLI'S ALLEGED CONDUCT

Next, appellant contends the trial court erred by preventing the defense from presenting certain evidence in support of its third party culpability theory, to the effect that Borelli had engaged in conduct "similar" to that involved in this case. Once again, the contention is meritless.

PROCEDURAL BACKGROUND

At issue is appellant's attempt to convince the jury that the Bells' murders were ordered or instigated by Borelli and performed by persons other than appellant, through the introduction of evidence to the effect that various allegedly "independent" witnesses had heard Borelli (a) complain victim Cynthia Bell owed him a drug debt, (b) state "he wanted her taken care of," and (c) subsequently admit having ordered the Bells' murder. In support of this theory, appellant sought to introduce alleged "character" evidence to the effect that, on various other occasions, Borelli had asked people to "take care of" *other* individuals with whom he was having difficulties.

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[15] In any event, given the substantial evidence supporting appellant's guilt and Hurtz's admission that he had been convicted of an unnamed felony, it is not reasonably probable that permitting the defense to establish that Hurtz had been convicted of selling drugs would not have tipped the balance in this case in favor of acquittal. (*Watson, supra,* 46 Cal.2d at p. 836.)

Thus, appellant moved in limine to permit the introduction of testimony regarding three alleged incidents supposedly "similar" to the Bells' murders. In the first alleged incident, Bernal allegedly asked Vergos to "take care of" Debra Neundorf for Borelli. Vergos refused. Borelli then asked Neundorf to meet him "in a somewhat isolated location" on the side of a road just off Interstate 505. There, Borelli and Neundorf had an angry conversation. Borelli pulled out a gun and fired three times, shouting " 'you need to be like George, dead.' " Neundorf was able to avoid the shots, and Borelli "sped off." In the second alleged incident, Bernal approached appellant and asked him to "get rid of a guy named Rick for Borelli." Appellant refused, but later confronted Borelli, "who confirmed that he wanted Rick harmed." In the third alleged incident, Bernal confided to Murphy that he and Borelli had planned "to get rid of" appellant. Bernal offered to introduce Murphy to the people who were to commit the homicide, but Murphy refused.

During the colloquy with the trial court concerning this motion, the trial court pointed out that all of the testimony concerning the incidents was hearsay and asked, "How am I going to get those in?" The trial court then denied the motion in limine *without prejudice*, expressly in order to permit defense counsel to renew the motion when seeking to introduce the testimony during trial. However, appellant did not attempt to introduce this evidence again.

EVIDENCE OF ALLEGED PRIOR MISCONDUCT TO PROVE THIRD-PARTY CULPABILITY

The fact that an individual may have committed other offenses in the past may be evidence of his or her bad character, or propensity or disposition to commit the crime charged. As a general rule, evidence of a person's character or character trait, whether in the form of an opinion, reputation, or specific instances of conduct, is inadmissible when offered to prove that person's conduct on a given occasion. (Evid. Code, § 1101, subd. (a).) If evidence of prior misconduct, bad acts or offenses is offered only for this purpose, it must be excluded. (*People v. Thompson* (1980) 27 Cal.3d 303, 316-317; *People v. Baskett* (1965) 237 Cal.App.2d 712, 715, overruled on other grounds in *People*

v. Kelley (1967) 66 Cal.2d 232, 243, fn. 5; 1 Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 356, pp. 325-326.)

However, where the purpose of introducing evidence of other crimes, uncharged offenses or prior bad acts is not to show bad character or a disposition to commit a crime, but instead is to establish some other independent material fact in issue in the case, the evidence may be admissible for that particular limited purpose. (Evid. Code, § 1101, subd. (b); *People v. Haslouer* (1978) 79 Cal.App.3d 818, 825; 1 Witkin, Cal. Evidence, *supra,* Circumstantial Evidence, § 357, pp. 326-328.) Thus, among other things, evidence of prior misconduct is admissible if relevant to prove identity, opportunity, intent, or common design, method, scheme or plan. (Evid. Code, § 1101, subd. (b); *People v. Balcom* (1994) 7 Cal.4th 414, 422; *People v. Ewoldt* (1994) 7 Cal.4th 380, 399-402; *Haslouer, supra,* 79 Cal.App.3d at p. 825; CALJIC No. 2.50 (1994 rev.) (5th ed. supp.); 1 Witkin, Cal. Evidence, *supra,* Circumstantial Evidence, § 357, pp. 326-328.) This analysis also applies to "proposed evidence regarding prior criminal conduct of a third party alleged to have committed the charged offense." (*People v. Davis* (1995) 10 Cal.4th 463, 501.) In such a case, the proffered third party culpability evidence must "show a fact other than the third party's criminal disposition, such as motive or intent," or else it "does not amount to direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Ibid.*)

Appellant now contends the trial court prejudicially erred in limiting his right to present a defense based on third party culpability by introducing evidence of alleged prior similar conduct under Evidence Code section 1101. According to appellant, the evidence of Borelli's alleged acts and behavior with regard to persons other than the victims in this case was admissible as relevant to prove a common scheme, design or plan. (Evid. Code, § 1101, subd. (b); *Balcom, supra,* 7 Cal.4th at p. 422; *Ewoldt, supra,* 7 Cal.4th at pp. 399-402; *Haslouer, supra,* 79 Cal.App.3d at p. 825; CALJIC No. 2.50 (1994 rev.) (5th ed. supp.); 1 Witkin, Cal. Evidence, *supra,* Circumstantial Evidence, § 357, pp. 326-328.)

Evidence of an individual's previous uncharged misconduct may be relevant and admissible where the uncharged misconduct and the charged offense share sufficient common features to support the inference that they are both manifestations of a common design or plan. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 401, 403.) In determining whether evidence of the uncharged prior misconduct is relevant to demonstrate a common design, method or plan, the court must consider the nature and degree of similarity between the uncharged misconduct and the charged offense. (*Id.* at p. 402.) The degree of similarity required to establish a common design, method, scheme or plan is greater than that required to prove intent, but less than the high degree of similarity required to prove identity. (*Id.* at pp. 402-403.) In order to establish a common design or plan, the evidence of prior uncharged misconduct must demonstrate not just a mere similarity in results, but such a " 'concurrence of common features' " that the various events are naturally explained as the individual manifestations of a general design, method, scheme or plan rather than merely a series of similar spontaneous acts. (*Id.* at p. 402.)

The Supreme Court in *Ewoldt* requires a two-step analysis before prior uncharged offenses are admitted in a subsequent trial on charges of similar offenses: the initial analysis under Evidence Code section 1101; and an additional analysis under Evidence Code section 352 to determine whether the probative value of the uncharged prior offenses was substantial enough to outweigh the prejudice inherent in all such evidence. (*Ewoldt, supra,* 7 Cal.4th at pp. 404-407.) It is not necessary that the trial court specifically mention Evidence Code section 352 in making this analysis, although it is better practice to do so. What is essential is that the record show the trial court in fact weighed prejudice against probative value. (*People v. Zapien* (1993) 4 Cal.4th 929, 960; *People v. Heishman* (1988) 45 Cal.3d 147, 170.) This determination is committed to the sound discretion of the trial court, and will not be reversed on appeal absent a clear abuse of discretion. (*People v. DeRango* (1981) 115 Cal.App.3d 583, 589-590.)

The underlying inference supporting the admission of prior bad act evidence is that, if the individual committed the former act and did so in a particular fashion, he or

she must also have committed the charged crime, in the same way or with the same intent. (*People v. Diaz* (1992) 3 Cal.4th 495, 561-562; *Robbins, supra,* 45 Cal.3d at p. 879; *People v. Wade* (1988) 44 Cal.3d 975, 990; *Thompson, supra,* 27 Cal.3d at p. 315; *Haslouer, supra,* 79 Cal.App.3d at pp. 827-828.) No matter for which purpose the prior act evidence is admitted—whether to show "identity," "intent," or the existence of a "common scheme or plan" pursuant to which the charged act allegedly occurred—the essential foundational premise for admission of the uncharged acts is that *the alleged acts were actually committed by the individual in the first place.* Unless this fundamental precondition is met, evidence of uncharged acts can have no materiality to the charged offense, and cannot form the basis for any reasonable inferences about the individual's intent, plan, or identity as the perpetrator. (*People v. Albertson* (1944) 23 Cal.2d 550, 576-581; *People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006-1008; *People v. Dellinger* (1984) 163 Cal.App.3d 284, 298-300; *People v. Long* (1970) 7 Cal.App.3d 586, 590; *People v. Jackson* (1967) 254 Cal.App.2d 655, 658-660.)

DISCUSSION: APPELLANT'S PROFFERED EVIDENCE WAS INADMISSIBLE

The short answer to appellant's contention that the trial court erred in not permitting him to introduce the subject "evidence" in this instance is that there was no competent evidence to be admitted. Even if relevant, hearsay evidence is inadmissible except as provided by law. (Evid. Code, § 1200, subd. (b).) Appellant never responded to the trial court's expressed concern that the entirety of the proffered testimony constituted inadmissible hearsay. Certainly, he did not establish that it came within any particular exception to the hearsay rule. As the proponent of this evidence, appellant bore the burden of establishing the necessary foundation for its admission. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177.) We will not assume error in the absence of any record affirmatively supporting such a foundation. Having failed to proffer competent, admissible evidence that Borelli had *actually engaged in* the supposedly "similar" prior acts or that any of these alleged incidents *actually occurred*, appellant cannot possibly

assert error in the trial court's refusal to admit this testimony under Evidence Code 1101. (Evid. Code, § 354; *Ramos, supra,* 15 Cal.4th at pp. 1177-1178.)[16]

VII. ADMISSION OF EVIDENCE OF APPELLANT'S BEHAVIOR TOWARD MURPHY

In a corollary to the preceding argument, appellant urges that because his proffered "bad acts" evidence against Borelli was excluded, the trial court should also have excluded the evidence of appellant's threatening behavior toward Murphy. There is no merit to the contention.

The crucial difference between the two situations is both obvious and determinative. As seen, there was no competent evidence proffered concerning Borelli's alleged prior threats or misdeeds against third persons. On the other hand, Murphy herself testified at length about how appellant took her for a long drive along deserted country backroads, stopped his pickup truck in an isolated location, threatened her life over a drug and money dispute, fired his .357-magnum out of the window, and told her he "was going to get to the bottom of this." Murphy's direct testimony about appellant's words and actions toward her indisputably distinguishes this incident from those alleged by appellant of Borelli.

By the same token, there is no question the evidence of appellant's behavior toward Murphy was admissible to prove motive, opportunity, intent, preparation, plan, knowledge and potential identity. The incident evidenced appellant's practice of using his gun to threaten people over drug and money disputes, his method of going to an isolated spot to do so, and his stated desire and intent to kill those who he perceived as cheating him. This incident, occurring only two days before the subject murders, clearly

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[16] For example, appellant has never offered *any* evidence to support his assertions about Borelli's alleged attempts to shoot Neundorf during an argument with her on a side road off Interstate 505. As appellant concedes, Neundorf herself *denied* that Borelli ever threatened her or that she was afraid of him. Appellant does not suggest what sort of competent evidence could contradict the testimony of the only two people purportedly

demonstrates motive, plan, intent and identity. There was no error or abuse of discretion in admitting this evidence.

VIII. EXCLUSION OF TESTIMONY OF DEFENSE WITNESS MAPLES

Appellant argues the trial court denied him his constitutional right to present a defense and to a fair trial by excluding the testimony of defense witness Pamela Maples to the effect that she overheard Hurtz confess to two killings committed under circumstances similar or matching those of the murders at issue in this case. To the contrary, the record demonstrates there was no error or violation of appellant's constitutional rights.

FACTUAL AND PROCEDURAL BACKGROUND

Defense witness Pamela Marie Maples testified that Hurtz was her cousin. According to Maples, while at her sister's house in Vallejo in April 1994 she "overheard" Hurtz discussing some homicides. After the trial court sustained the prosecution's objection to the admission of Maples' testimony as to what she heard Hurtz say, the defense made an offer of proof that Maples overheard him say he had killed a man and a woman in a car in Vacaville, and was covered with blood as a result.

Under questioning outside the presence of the jury, Maples testified that she was present with her sister, Hurtz, and "a guy named Steve" at a conversation in which Hurtz allegedly said he had killed a man and a woman in a car. Maples was "in and out of the room" at the time, only heard "bits and pieces" of the conversation, and never joined in it. The conversation was already underway when she came in; she did not know how long they had been discussing the murders, the context of the discussion, or whether it was "serious" or not. Nevertheless, Maples testified that Hurtz said he shot "[t]he girl" "[i]n the head" first, and "[t]hen he reached over and shot the guy." Hurtz said they were in a parking place, but did not otherwise describe the locale of the murders or the type of car

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present at the alleged incident. Similar difficulties exist with respect to the hearsay evidence regarding the other two allegedly "similar" incidents.

the victims were in. Afterward, according to Maples' version of what Hurtz said, "he was full of blood" and "ran through a field, threw mud up on himself, and then went to make the phone call for somebody to pick him up." Maples "didn't hear" Hurtz say when the murders took place. Under cross-examination, she acknowledged that she had no idea whether the murders took place one week or 10 years before the conversation, or whether they took place in California or somewhere else.

The trial court sustained the prosecution objection, stating the defense had failed to establish sufficient foundation to permit Maples to testify as to the alleged statements of Hurtz, because there was insufficient evidence to connect the details of the incident allegedly described by Hurtz to the facts of the murders at issue in this case.

APPLICABLE LAW

A criminal defendant has the right to present evidence of third party culpability if it is capable of raising a reasonable doubt about the defendant's own guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 264.) However, a trial court is not required to permit the admission of *any* evidence, however remote, to show a third party's culpability. "[T]here must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Hall, supra,* 41 Cal.3d at p. 833; see also *People v. Clark* (1992) 3 Cal.4th 41, 131; *Sandoval, supra,* 4 Cal.4th at p. 176.)

The mere possibility that some third person committed the crime is not enough. In order to place reasonable limits on the trial of collateral issues and avoid undue prejudice to the People from unsupported jury speculation on the possible guilt of other suspects, there must be some competent and substantial proof of a *probability* that this actually happened. (*People v. Green* (1980) 27 Cal.3d 1, 22, overruled on other grounds in *Hall, supra,* 41 Cal.3d at p. 834, fn. 3; *People v. Perry* (1980) 104 Cal.App.3d 268, 272; *People v. Whitney* (1978) 76 Cal.App.3d 863, 869-870.) Even if a defendant's evidence is found to raise a reasonable doubt, the evidence may still be excluded in the discretion of the trial court if its probative value is substantially outweighed by the risk of undue delay,

prejudice, or confusion of the issues. (§ 352; *Hall, supra,* 41 Cal.3d at pp. 829, 834; *Von Villas, supra,* 10 Cal.App.4th at p. 265.) An appellate court should not disturb the trial court's exercise of its wide discretion in making this determination unless there has been a manifest abuse of discretion resulting in a miscarriage of justice. (*People v. Milner* (1988) 45 Cal.3d 227, 239; *People v. Harlan* (1990) 222 Cal.App.3d 439, 446.)

DISCUSSION: NO ABUSE OF DISCRETION

The trial court did not abuse its discretion in excluding Maples' testimony in this case. Even if her testimony was fully credited, there was simply insufficient evidence to connect the murders she heard Hurtz describe, with the ones at issue here. Although Hurtz allegedly said he shot a man and a woman sitting in a car in a "parking place," Maples did not know when or where the killing occurred, or even if Hurtz was seriously describing an act he had himself committed. There was no mention of Cynthia or James Bell, and indeed no identification of the alleged victims' of Hurtz's murders at all.

Given the absence of any actual linkage to the charged offenses, or any other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell, Maples' testimony simply did not tend to show appellant's innocence. In view of the total lack of identifying information linking the alleged uncharged offense and the charged crimes, the evidence was insufficient to raise a reasonable doubt. The trial court's ruling was an appropriate exercise of its discretion under section 352. (*Davis, supra,* 10 Cal.4th at p. 502; *Pride, supra,* 3 Cal.4th at p. 238; *Clark, supra,* 3 Cal.4th at pp. 132-133; *Von Villas, supra,* 10 Cal.App.4th at pp. 266, 267.)[17]

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[17] At any rate, no possible prejudice could have occurred to appellant as a result of the exclusion of Maple's testimony. As seen, the trial court had already permitted appellant to introduce the very similar testimony of both Harmina Ross and Eliane West regarding Hurtz's alleged confessions of shooting two unidentified people at close range while the victims were sitting in a parked car near Vacaville. Maple's testimony to similar effect was merely cumulative.

IX. EXCLUSION OF IMPEACHMENT EVIDENCE AGAINST NEUNDORF

Appellant next contends the trial court erred in refusing to allow him to impeach the stipulated testimony of his own defense witness Debra Neundorf by means of alleged prior inconsistent statements and statements against penal interest. Although we believe the trial court erred in its analysis of the question whether Neundorf's alleged out-of-court statements were made against her penal interest, we conclude that any possible error in denying their admission was not prejudicial.

PROCEDURAL BACKGROUND

Debra Neundorf was called as a defense witness at both of appellant's prior trials. The defense was unable to call her in person as a witness at this trial because she was declared unavailable, having invoked her Fifth Amendment rights due to an arrest prior to trial. The parties therefore stipulated that her testimony from the second trial could be read into evidence. Pursuant to this stipulation, Neundorf's direct, cross, redirect and recross examinations from the prior trial were all read into the record. In that testimony, Neundorf testified that although she had previously dated Borelli, she was not dating him in October 1992; she never sold drugs to Cynthia Bell on Borelli's behalf; she never heard Borelli make threats against the Bells; Borelli never told her he was responsible for the Bells' murders or that he had the murder weapon; Borelli had never threatened her to dissuade her from testifying; and she was not afraid of Borelli. Appellant also questioned Neundorf on whether she had told defense investigator McClellan she was dating Borelli in October 1992.

Several days after Neundorf's previous trial testimony was read into the record, defense counsel called one Robert Morse to impeach Neundorf with new testimony that while recently in jail custody, she told Morse she had been untruthful in her prior testimony, she was very afraid of Borelli, and Borelli had told her he had the murder weapon. The prosecutor objected on the grounds Morse's testimony about Neundorf's alleged recent statements was hearsay offered for proof of the facts asserted; Neundorf was unavailable to be cross-examined about her conversation with Morse; and, because

the recent statements to Morse were made long after Neundorf's earlier trial testimony, she necessarily could not have been examined at that time so as to give her an opportunity to explain or deny her alleged subsequent statements. The trial court announced it would sustain the objection unless the defense could establish some legal right to present the new testimony.[18]

At a further hearing on the matter the next day, defense counsel argued Morse's testimony should be admitted on two grounds: (1) because during her previously transcribed testimony at the earlier trial Neundorf was cross-examined on similar statements concerning Borelli she allegedly made to a different defense investigator, the defense had already satisfied any confrontation requirements for the admission of her subsequent statements to Morse as prior inconsistent statements; and (2) Neundorf's

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[18] The following colloquy took place: "MR. KEALY [the prosecutor]: She's not available for cross-examination on these. The Court has declared her unavailable as a witness. I don't know whether she's going to come in and say I never talked to Mr. Morse about this. She's never been asked, did you tell Mr. Morse these things.

"THE COURT: Okay. I'm going to sustain the objection subject to if you can find me some law. But my feeling is we declared her to be unavailable. Now, she's testified by way of stipulation from her prior trial, and I think you're stuck with that. If you have some law that says otherwise, give it to me. We'll address it . . . .

"MR. KEALY: Your Honor, if I may, just because counsel has some case—

"MS. VOSS [defense counsel]: I don't understand the grounds for sustaining it. It's impeachment. Just because she's unavailable—she wasn't unavailable when this, uh, conversation took place. Um, she said it, and she was cross-examined as to these matters.

"MR. KEALY: There's been no testimony cross-examined as to anything she told Mr. Morse. We read her testimony in a couple weeks ago. Apparently, if I'm right, this happened with Mr. Morse within the last week?

"THE WITNESS [Morse]: Yes.

"MR. KEALY: The last couple of days?

"THE WITNESS: Last few days. But she was cross-examined on these matters, and she said something different. This is impeachment.

"THE COURT: No, that wouldn't be fair. In other words, you read in the testimony and then you go investigate, get something different. She's not around, and how can the other side, whether it was one way or the other, . . . confront the witness? That's the real problem."

alleged statements to Morse that she had been untruthful in her trial testimony were separately admissible as declarations against penal interest. The prosecutor responded that Neundorf had only been cross-examined about her earlier alleged statements to defense investigator McClellan, and had not had the opportunity to be confronted with her alleged statements to Morse. The trial court noted that "the real question" was the "fundamental fairness" of permitting one side to stipulate to the previous testimony of a witness, and then contradict that testimony with hearsay statements made after the fact while the witness was unavailable to testify.

The trial court ultimately sustained the objection, concluding that the prior inconsistent statement exception to the hearsay rule "applies only when the person whose statement is being used is a witness and has an opportunity to explain or to deny the statement." The court also noted that the hearsay statements sought to be admitted were made subsequent to her testimony, and were therefore not "prior" inconsistent statements. With respect to the question of whether they were admissible as against Neundorf's penal interest, the trial court found that Neundorf's alleged admission that she was "untruthful" in her previous trial testimony lacked any evidentiary value because it could not be ascertained whether or not the subject as to which she allegedly stated she had not told the truth constituted a "material fact."[19]

APPLICABLE LEGAL PRINCIPLES

The hearsay rule bars admission of any "evidence of a statement that was made other than by a witness while testifying at the hearing," when "offered to prove the truth of the matter stated." (Evid. Code, § 1200.) One of the specific exceptions to the hearsay rule is set out in Evidence Code section 1230 for statements "so far contrary" to the

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[19] The trial court stated: "Now she [Neundorf] makes a statement, according to Mr. Morse that he overheard, that ['] when I testified I wasn't telling the truth.['] . . . [¶] I don't know if that would be to a material fact, to every fact, or to no fact, or to the way she spelled her name when she was asked how to spell her last name. And so I don't know what evidentiary value that has."

declarant's personal interests "that a reasonable [person] in his [or her] position would not have made the statement unless he [or she] believed it to be true."[20] "A party who maintains that an out-of-court statement is admissible under this exception as a declaration against *penal* interest must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. [Citation.] To determine whether the declaration passes the required threshold of trustworthiness, a trial court 'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.] On appeal, the trial court's determination on this issue is reviewed for abuse of discretion." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607, original italics.)[21]

The hearsay statements sought to be introduced in this instance—Neundorf's assertions she had not told the truth during her previous trial testimony—are alleged by

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[20] Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk or making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

[21] The other exception to the hearsay rule relevant to this case provides that statements by a witness "inconsistent with his [or her] testimony at the hearing" may be admitted if "offered in compliance with [Evidence Code] Section 770." (Evid. Code, § 1235.) Evidence Code section 770, subdivisions (a) and (b), in turn provides that, in order to admit "extrinsic evidence of a statement made by a witness that is inconsistent with any part of his [or her] testimony at the hearing," the witness must have been "so examined while testifying as to give him [or her] an opportunity to explain or deny the statement"; or else the witness must have "not been excused from giving further testimony in the action." Under this provision, the witness must be given a "realistic opportunity" to

appellant to have been against Neundorf's penal interest because they exposed her to a charge of perjury. Perjury is defined, in relevant part, as a declaration made "willfully and contrary to . . . oath" which "states as true any material matter which he or she knows to be false." (§ 118.) The materiality of the misstatement of fact is thus an element of the offense. The test for whether a misstatement of fact was "material" is whether it might have been used to affect the proceeding in or for which it was made, or whether it could have influenced the outcome of the proceedings. (*People v. Kobrin* (1995) 11 Cal.4th 416, 420, 427; *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1575; *People v. Pierce* (1967) 66 Cal.2d 53, 61.)

DISCUSSION

Appellant places principal reliance on his argument that the hearsay statements of Neundorf to Morse were admissible as prior inconsistent statements.[22] Regardless of the

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explain or deny the alleged statement. (*People* v. *Garcia* (1990) 224 Cal.App.3d 297, 304.)

[22] Appellant essentially argues that because the prosecution had adequate opportunity to cross-examine Neundorf at the trial at which she gave her prior testimony, all of the testimony admitted pursuant to stipulation as prior testimony by an unavailable declarant under Evidence Code section 1291 must be treated as though Neundorf actually gave it at the present trial. Thus, appellant insists, even though her hearsay statement to Morse was actually made *after* she testified at the earlier trial, under Evidence Code section 1291 it should be considered as having been a *prior* inconsistent statement, "i.e., one made before the testimony was presented to the jury."

Acceding to appellant's argument that Neundorf was subject to cross-examination at the time she gave her testimony in the previous trial, this cannot obscure the fact her alleged statements to Morse took place long *after* that testimony. At the time of that earlier trial she *could not have been* given an opportunity to explain or deny the statements she allegedly made to Morse, simply because she had not made those statements yet. Because only the *transcript* of Neundorf's previous testimony was admitted at the trial now on appeal, she was not actually a witness "at the hearing," as required by Evidence Code section 1235. Accordingly Neundorf's alleged out-of-court statements to Morse were inadmissible under both sections 1235 and 770 of the Evidence Code. (*People* v. *Williams* (1976) 16 Cal.3d 663, 668-669; *People* v. *Hitchings* (1997) 59 Cal.App.4th 915, 920-922.)

merits of that argument, we have concluded the trial court erred in its analysis of appellant's alternative contention that Neundorf's statements to Morse should have been admitted under the exception for declarations against penal interest.

The trial court's stated reason for rejecting admission of Neundorf's alleged hearsay statements to Morse on this ground was that there was insufficient evidence the statements were material. According to the trial court, it was impossible to tell what evidentiary value Neundorf's statements had because it was unclear what she was referring to when she told Morse she did not tell the truth at the prior trial.

Because materiality is an element of the crime of perjury, the prosecution's failure to prove it is fatal to a perjury charge. What is at issue here, however, is not the merits of a perjury claim, but the application of a particular hearsay exception to the admission of proffered out-of-court statements. As in the case of other hearsay exceptions, the essence of the exception for statements against interest is the declarant's state of mind at the time of making the subject statements. Specifically, the rationale of the exception is based on the assumption that reasonable persons would not say deleterious things about themselves if they thought doing so would be harmful to their interests. In this context, then, the question is not whether Neundorf's statements would ultimately be adjudged "material" and perjurious as a matter of law, but whether her statements could possibly expose her to a *charge* of perjury and therefore be considered contrary to her penal interest.

In this case, Neundorf purportedly admitted that she lied under oath. Even if she may ultimately have been acquitted of a perjury charge, her potential exposure to arrest, pretrial detention and criminal prosecution by itself is clearly contrary to her pecuniary interest, and certainly subjects her to the *risk* of criminal liability as well. Assuming Neundorf did lie under oath and admit that she had done so, it strains credulity to conclude she did not see herself at risk because she somehow had enough knowledge of criminal law to realize both that materiality was an element of the crime of perjury, and that no court would find her lies "material."

We conclude that a reasonable person in Neundorf's position would have thought of her admission of lying under oath as being against her interests, and her out-of-court statements therefore qualified for admission under that exception to the hearsay rule. Even so, the trial court could still have excluded the statements if it determined they were not sufficiently reliable or trustworthy. (*People v. Cudjo, supra,* 6 Cal.4th at pp. 607-609; *People v. Frierson* (1991) 53 Cal.3d 730, 745.) Here, it does not appear the trial court made such a factual determination. We are loath to do so in the first instance on this appeal. Assuming the statements were sufficiently reliable, we therefore assume further that their exclusion was error.

That error, however, does not compel reversal; the question of prejudice remains. Assuming the trial court abused its discretion in barring the admission of this testimony, we may not reverse or set aside the judgment unless, in light of the entire record, we conclude the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) We cannot so conclude in this case.

The body of evidence against appellant was extensive and compelling, as we have set out in some detail. Numerous witnesses testified appellant not only threatened the lives of the victims on several occasions during the days just before the killings, but he also acknowledged committing the murders soon afterward. At least one of the murder bullets was identified as having been fired from appellant's gun. Several witnesses saw that gun in appellant's possession both immediately before and immediately after the murders. Other than Neundorf's hearsay statement to Morse that Borelli told her he had the murder weapon, there was *no other evidence* Borelli ever had possession or control of the gun used to kill the victims. Even accepting Borelli's alleged statement to Neundorf at face value, there is nothing to indicate *when* he might have had possession of the gun, or what the circumstances of his possession were. Indeed, whether or not Borelli said he had possession of the murder weapon, nothing in appellant's proffer suggests he ever admitted committing the murders.

Finally, Neundorf's reported statements to Morse had obvious indicia of unreliability. Not only were Neundorf's statements hearsay, but they were themselves chiefly concerned with alleged double hearsay statements by Borelli concerning his supposed possession of the murder weapon. Appellant's main reason for seeking admission of this double hearsay was as proof of the facts asserted. Thus, the reliability of *both* Neundorf and Borelli himself was placed in issue by Morse's proffered testimony. The testimony consists of jailhouse assertions that the declarant lied under oath during her previous testimony, which assertions the defense now seeks to admit as the truth without any chance for testing by cross-examination. Given her incarceration, Neundorf's motives for making the supposed admissions are certainly suspect. Under all these circumstances, there is only a remote chance a reasonable jury would have given substantial weight either to Neundorf's hearsay statements to Morse, or to the double hearsay statements of Borelli that Neundorf reportedly recounted. On this record, we conclude it is not reasonably probable that a result more favorable to appellant would have occurred in the absence of the trial court's error in articulating its reasons for denying admission of this evidence. (Cal. Const., art. VI, § 13; *Cudjo, supra,* 6 Cal.4th at pp. 612-614; *People v. Watson* (1956) 46 Cal.2d 818, 836.)[23]

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[23] In his reply brief, appellant for the first time argues that even if the statements allegedly made by Neundorf to Morse were inadmissible to prove their truth, they should have been admitted as impeachment evidence under Evidence Code section 1202. In the first place, appellant may not raise this argument for the first time in his reply brief. It is an established rule that points raised for the first time on appeal in a reply brief will ordinarily not be considered, in the absence of a showing of a good reason for the failure to present them earlier. To do so would deprive the respondent of an opportunity to counter the argument. Because appellant failed without good cause to raise this contention until his reply brief, we reject it. (*Reichardt* v. *Hoffman* (1997) 52 Cal.App.4th 754, 764-765; *Neighbours* v. *Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 616, pp. 647-648; 6 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Appeal, § 3250, pp. 4015-4017.) In any event, as already discussed, any error in failing to admit this evidence was harmless.

X. ADMISSION OF ALLEGEDLY "COERCED" TESTIMONY

Appellant argues the trial court erred by permitting the testimony of prosecution witnesses Edgar Fry, Debbie Mathies and Shannon Nissen to be admitted because it was allegedly "coerced" by the law enforcement authorities. In support, appellant points to evidence that each of these witnesses originally told the police that appellant was not involved in the murders, and did not begin to cooperate "until their own personal interests required them to implicate him."

This argument fails. When appellant first raised it at trial, the trial court reviewed all the transcripts provided by defense counsel of the witnesses' prior testimony at appellant's earlier trials. The trial court noted that although the police informed the witnesses they could be charged as accessories in connection with this case, there was also evidence the police pressed them only to "tell the truth." The trial court concluded that although there were certainly evidentiary questions going to the credibility of these witnesses, there simply was insufficient evidence they had been coerced to bar their testimony from admission altogether.

A defendant has only a limited right to exclude the testimony of third parties on the ground that it was coerced. In any motion to exclude the testimony of a third party witness on grounds of coercion, the defendant bears the burden of proving that (a) the witness was improperly coerced; and (b) the reliability of the witness's testimony was actually impaired by the coercion. (*People v. Badgett* (1995) 10 Cal.4th 330, 346-350; *People v. Douglas* (1990) 50 Cal.3d 468, 500.) Although the claim that a witness's statement to the police was involuntary is subject to independent review on appeal, when faced with conflicting testimony in the record a reviewing court must accept the version of the event most favorable to the People. (*Badgett, supra,* 10 Cal.4th at pp. 350-352; *People v. Howard* (1988) 44 Cal.3d 375, 394.)

The record in this case fully supports the trial court's determination. The jury heard both the initial versions of the facts given to the police by Nissen, Mathies and Edgar Fry, and their subsequent statements inculpating appellant. All three witnesses

acknowledged they knew of their exposure to charges relating to drugs or complicity in the facts of this case, but specifically denied being subject to police threats, pressure or coercion to say anything other than the truth. There is nothing inherently coercive about confronting a suspect with the legal predicament he or she is in, or with an offer to release from custody or refrain from prosecuting the suspect in return for his or her cooperation with a police investigation. (*Badgett, supra,* 10 Cal.4th p. 355; *Douglas, supra,* 50 Cal.3d at p. 502, fn. 7.) Nothing more coercive than that occurred in this case. Ultimately, the question was one of credibility. The jury had before it all of the relevant evidence, and was in the best position to judge the credibility of these witnesses. There was no error.

XI. RESTRICTION OF CROSS-EXAMINATION OF EDGAR FRY

Finally, appellant maintains the trial court improperly restricted his cross-examination of prosecution witness Edgar Fry, thereby allegedly denying appellant's constitutional rights to confront and cross-examine the witnesses against him. As in the case of his other arguments, appellant is wrong.

Appellant asserts the trial court prohibited him from "fully exploring" four "areas related to Edgar's credibility": (1) the threats allegedly made to him by the police; (2) problems in Edgar's relationship with appellant; (3) questions about Edgar's state of mind at the time of the murders, including his alleged depression, drinking and drug abuse problems; and (4) questions about whether Edgar obtained the factual information to which he testified from his own personal knowledge or from the police. According to appellant, the trial court improperly "restricted defense questioning in each of these areas. over defense objection," on the grounds "there had already been adequate testimony in those areas." Yet appellant does not provide *any specific examples* of questions he asserts were proper, but which were improperly disallowed by the trial court.

Under the Sixth Amendment of the United States Constitution, a defendant has the constitutional right to confront the witnesses against him and to cross-examine his or her accusers. Nevertheless, a trial court retains broad discretion over the conduct of trial. Included within this discretion is the power to impose reasonable limits on cross-

examination, in order to preclude repetitive, confusing, and unduly harassing interrogation. Thus, the Confrontation Clause simply guarantees an *opportunity* for effective cross-examination; it does not guarantee an opportunity to cross-examine in whatever way, and to whatever extent, the defense might wish. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680; *Davis v. Alaska* (1974) 415 U.S. 308, 315-316.) As long as the cross-examiner has the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the jury fairly to appraise it, the trial court may permissibly limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues. (*Davis v. Alaska, supra,* 415 U.S. at p. 318; *Evans v. Lewis* (9th Cir. 1988) 855 F.2d 631, 634; *Steele v. Perez* (7th Cir. 1987) 827 F.2d 190, 193-194.)

Appellant's failure to cite *any* examples of questions he contends the trial court should have permitted him to ask Edgar Fry is fatal to his present argument. Contrary to appellant's vague assertion of improper restrictions on his cross-examination of Edgar, the record actually shows defense counsel was given ample opportunity to inquire into all of the subjects he cites in his brief on appeal. Thus, the trial court permitted defense counsel to question Edgar on his state of mind and usage of drugs and alcohol around the time of the murders. Under cross-examination, Edgar conceded he was depressed about his separation from his wife, and had been using drugs and alcohol. Defense counsel also questioned Edgar at great length about the supposed threats made to him by the police. Similarly, defense counsel cross-examined Edgar concerning his relationship with his brother with repeated questioning about whether they had a "good" relationship, how much time Edgar spent at appellant's house, whether the two "clicked," whether Edgar told the police he did not "give a 'F' about" appellant, and whether Edgar ever called appellant "a kick in the dirt as far as I'm concerned." Finally, defense counsel was permitted to question Edgar at length about whether the information to which he testified "originated" with the police as opposed to his own personal experience and observation.

On this record, appellant has utterly failed to establish that any unconstitutional restrictions were placed on his cross-examination of Edgar. To the contrary, the record demonstrates that, as to every subject now cited by appellant as an example of one on which his cross-examination of Edgar was unduly restricted, he actually asked many probing questions and was barely restricted in his cross-examination at all.

XII. DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Corrigan, J.

Parrilli, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

On May 6, 2000, I served the foregoing document described as APPELLANT'S PETITION FOR REVIEW on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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First Appellate District
Division Three
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San Francisco, CA 94103

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c/o Clerk, Superior Court
Solano County Hall of Justice
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Fairfield, CA 94533

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IN THE DISTRICT COURT OF APPEAL

IN AND FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

--o0o--

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
JOHN FRANCIS FRY,
Defendant and Appellant.

No. _____

--o0o--

REPORTER'S TRANSCRIPT ON APPEAL

FROM THE SUPERIOR COURT OF SOLANO COUNTY

STATE OF CALIFORNIA

HONORABLE WILLIAM C. HARRISON, PRESIDING

--o0o--

VOLUME XIII

PAGES 4101 THROUGH 4400

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ALISON L. GABODA, CSR NO. 7858
LAURA M. FORSTER, CSR NO. 8832
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IN THE DISTRICT COURT OF APPEAL

IN AND FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JOHN FRANCIS FRY, Defendant and Appellant.	No. _____

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STATE OF CALIFORNIA

HONORABLE WILLIAM C. HARRISON, PRESIDING

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going to get together to put it off on the defendant?

A No, it was just Arleen, Ryan, Shannon.

Q Didn't mention that a Debbie Mathies was part of this to put it off on the defendant, did he?

A No.

MR. KEALY: I have no further questions. Thank you very much.

MS. VOSS: Nothing further.

THE COURT: All right. You may step down.

THE WITNESS: Okay.

THE COURT: All right. Next witness on behalf of the defense.

MS. VOSS: Pam Maples.

MR. KEALY: I'm sorry --

MS. VOSS: Pam Maples.

PAMELA MARIE MAPLES

called as a witness on behalf of the Defense, being duly sworn to tell the truth, the whole truth, and nothing but the truth testified as follows:

THE WITNESS: Yes.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Pamela Marie Maples, M-a-p-l-e-s.

THE COURT: All right. Ms. Maples, they have some questions of you.

May Voss, you may proceed.

MS. VOSS: Thank you.

DIRECT EXAMINATION

BY MS. VOSS:

Q Ms. Maples, do you know anybody by the name of John Fry?

A No, ma'am.

Q Do you know somebody by the name of Tony Hurtz?

A Yes.

Q How do you know Tony Hurtz?

A He's my cousin.

Q And, uh, at some point did you hear him discuss any homicides?

A Yes.

Q And when was that?

A It was in April of '94.

Q And, uh, who was, uh -- where did this take place?

A In Vallejo at my sister Tammy Terrazas' (ph) house.

Q Were you involved in the conversation, or did you just overhear it?

A Just overheard it.

Q And what did you hear Mr. Hurtz say in regards to the homicide?

MR. KEALY: Objection, hearsay, relevance.

MS. VOSS: I'm making --

MR. KEALY: No foundation.

THE COURT: Sustained.

MS. VOSS: I'd gladly make an offer of proof, your Honor.

THE COURT: We'll have to have the jury step outside. Why don't we take our recess now for the jurors. Hopefully you can return at 20 to 3:00, and we'll take care of our matters. Remember the admonition.

(Jurors leave)

THE COURT: All right. The jurors have left the courtroom. We're present with the defendant and counsel, and the offer of proof as to Ms. Maples?

MS. VOSS: Ms. Maples overheard Mr. Fry -- Mr. Hurtz say that he was the one who killed a man and woman in a car in Vacaville is my understanding.

THE WITNESS: Yes.

MS. VOSS: And that, uh, after he shot them, that he was full of blood, and that he, uh, put mud on himself or dirt on himself to cover up the mud -- I mean, to cover up the blood basically.

THE COURT: Mr. Kealy?

CROSS-EXAMINATION

BY MR. KEALY:

Q When did this conversation take place?

A April of '94.

Q Who other than yourself was present?

A My sister Tammy, myself, my cousin, and a guy named Steve.

Q Your cousin, you, Mr. Hurtz?

A Uh-huh.

Q Do you know who Steve is?

A No, sir.

Q And what part of the conversation did you overhear? Were you there for the whole conversation?

A No, I was in and out of the room when they were talking.

Q Well, what part -- was the conversation already underway about murders --

A Yes.

Q -- when you came in?

A Uh-huh.

Q Yes or no. We need a yes or no.

A Yes.

Q So you don't know how long they had been discussing, um, you know, whatever context -- what you heard? You don't know how that arose, do you?

A Huh-uh.

Q Yes or no, please.

A No.

Q And you say you were in and out. Did you stay for the whole conversation?

A No.

Q So you heard snippets of a conversation, correct?

A Yes.

Q How long were you in the room present -- well, actually when you come into the room, did you actually sit down and join the conversation?

A No, I was just in and out of the room. I just listened to bits and pieces of it.

Q So you don't know what was said before you were in the room, then you went out, when you came back in, correct?

A Uh-huh.

Q Again, yes or no.

A Yes.

Q And you don't know, I mean, whether this was a serious discussion or not, correct?

A Yes.

Q You do?

A No, I don't.

Q You don't know. I mean if, um, he had said, you know, I'm making a story or anything of the sort, correct?

A I don't know.

MR. KEALY: Nothing further.

THE COURT: Ms. Voss?

REDIRECT EXAMINATION

BY MS. VOSS:

Q Uh, when you -- you did hear Mr. Hurtz say that he had killed two people?

A Yes.

Q Did he describe whether they were male or female?

A He said male and female.

Q Did he say who he shot first?

A Yes.

Q Who did he say he shot first?

A The girl.

Q Did he say where he shot her?

A In the head.

Q What did he say he did next?

A Then he reached over and shot the guy.

Q And did he say what town they were in?

A No.

Q Did he say -- describe the area in any way?

A Um, he just said it was in a parking place.

Q A parking area?

A Yeah. Yes.

Q And did he say what he did after the homicides?

A Yes, he said he -- he was full of blood after the shooting, and he ran through a field, threw mud up on himself, and then went to make the phone call for somebody to pick him up.

MS. VOSS: Thank you. I have nothing further.

MR. KEALY: Yes, please, if I may?

THE COURT: You may.

RECROSS EXAMINATION

BY MR. KEALY:

Q When did Mr. Hurtz say that this murder had taken place?

A I didn't hear that.

Q So you don't know whether he was talking about something the week prior, two weeks prior, two months prior, two years prior, ten years ago?

A Yes.

Q Did he say where this murder took place, in what state?

A No.

Q It could have been in California, Arizona, New York, anyplace, correct?

A Yes.

Q Did, um, he say what day of the week it was?

A No.

Q Did he say who was with him?

A No.

Q And had you ever heard Mr. Hurtz discussing other criminal acts of his before?

A No.

Q You never heard him discuss other instances of murders?

A No.

Q So you don't know what he was talking about on this occasion, do you?

A No.

MS. VOSS: Your Honor, I'm going to object to this.

MR. KEALY: I have no further questions.

THE COURT: Okay. Ms. Voss, any further questions?

MS. VOSS: No, not for the purposes of this hearing.

THE COURT: Then I don't believe a sufficient foundation has been laid to allow this witness to testify as to alleged statements of Mr. Hurtz to be attributed to the incidents with which our trial is concerned without more, so --

MS. VOSS: Well, maybe I could ask a couple more questions. I don't know -- I don't understand the Court's ruling then.

THE COURT: You asked for a 402 hearing, and I made a ruling. All I'm doing is saying, with what I've heard, I would not allow this witness to testify as to what she heard to attempt to tie it into the facts with which our case is concerned.

FURTHER REDIRECT EXAMINATION

BY MS. VOSS:

Q Did he say whether the -- where the people were? Like were they in or out of a car?

A They were in the car.

Q Did he describe the car? Did he say whether --

THE COURT: You can't lead her. If you want to testify --

BY MS. VOSS:

Q A station wagon or --

A I can't say -- I mean, I don't know.

Q All right. Um, did he say anything else that would identify, uh, any other details about the homicide?

A Not that I can think of.

Q Uh, is Mr. Hurtz, um -- did he -- has he lived in this area, uh, all his life?

A I don't know, 'cause I wasn't raised with him.

Q Okay. In the last few years do you know where he's lived?

A In Sacramento and Fairfield.

MS. VOSS: Thank you. I have nothing further.
BY MR. KEALY:
Q You don't keep track of Mr. Hurtz's coming and going, do you?
A No.
Q I mean, two and-a-half years ago, you don't know where he was, do you?
A I believe he lived in Sacramento for a little while, then moved to Fairfield.
Q But I mean, he could go anywhere, you know, for any period of time and you won't know, correct?
A No.
MR. KEALY: That's all I have. Thank you.
THE COURT: All right. Then I'll sustained the objection to --
MS. VOSS: Your Honor --
THE COURT: -- lack of foundation to allow testimony as to alleged statements of Mr. Hurtz.
MS. VOSS: Well, your Honor, I would argue that the, um -- here we have enough detail to identify these murders, and plus it would be taken in with other murders. The jury should be allowed to decide what weight is given. We have a man and a woman who are killed in a car. The woman is shot in the head. Uh, it's done in a parking area. And, uh, there's certainly not a lot of homicides like that that go on. I would argue that this -- there is certainly sufficient detail to allow this in, and it's certainly a direct admission

by Mr. Hurtz that he was involved in these homicides.

MR. KEALY: No, your Honor, I mean, there's -- first of all, there's been absolutely no showing that whatever statement was made related in any way to this. To say this is a unique homicide, certainly is not. We cannot pin it down in any period of time in the past five, ten, fifteen years. I mean, she doesn't know.

THE COURT: Okay. I'm going to sustain the objection. You can always recall the witness. You have tomorrow off. I don't know what you can gather, but my feeling is today I'm not going to allow this witness to testify. You can give me authorities too with what was stated today whether or not you have a law that supports your position but there's not been a sufficient showing that this testimony ties in with the facts of our case.

All right. Do you have another witness?

MS. VOSS: Yes, I do.

THE COURT: All right. You may step down. And do counsel need five minutes?

MR. KEALY: If I could. Do we know who the witness is, if I need to get a book?

MS. VOSS: Harmina Ross. Maybe we should do the transcript right now.

THE COURT: We can do the transcript of Mr. Radossevich.

Okay. Get that ready, and get your reader here, and we'll stand in recess until a quarter to 3:00.

(Recess taken)